(23)

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1943

NO. 776

DEALER'S TRANSPORT COMPANY,
Petitioner,

Vs.

ESSIE MAE REESE, AS ADMINISTRATRIX OF THE ESTATE OF ISAAC REESE, DECEASED

DEALER'S TRANSPORT COMPANY,
Petitioner,

Vs.

LUCY ANN REESE, AS ADMINISTRATRIX OF THE ESTATE OF SARAH REESE, DECEASED.

DEALER'S TRANSPORT COMPANY,
Petitioner,

Vs.

MACK REESE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS. FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner seeks by writ of certiorari to review the final judgment of the United States Court of Appeals, Fifth Circuit, in the above named cause.

See report of case:

Dealers Transport Co. vs. Reese; Clark v. same, 138 F (2d) 638.

SUMMARY STATEMENT OF THE MATTER INVOLVED:

Respondent, Essie Mae Reese, as Administratrix of the estate of Isaac Reese, deceased, on September 8th, 1942, sued petitioner and James Olan Clark in the Circuit Court of Montgomery County, State of Alabama, claiming fifteen thousand dollars as damages for the death of her intestate, Isaac Reese, averring that said death was caused by James Olan Clark, the agent, servant or employee of petitioner, by negligently running an automobile into or against the mules and wagon driven by plaintiff's intestate, it being averred that as a proximate result of the negligence complained of Isaac Reese, her intestate, was killed. (Rec. p. 15.)

A similar suit was brought on the same date and in the same court by Lucy Ann Reese, as Administratrix of the estate of Sarah Reese, deceased, claiming fifteen thousand dollars as damages for the death of her intestate, Sarah Reese, growing out of the same accident, the same acts of negligence on the part of the driver, James Olan Clark, as averred in the suit of Essie Mae Reese, Administratrix of the Estate of Isaac Reese, deceased, above referred to. (Rec. pp. 151-2.)

The third suit grew out of the same accident referred to in the two suits above named, and was brought in the same State Court, on the same date, against the same defendants, by Mack Reese, claiming fifteen thousand dollars as damages for personal injuries, it being averred that such injuries resulted from the same acts of negligence on the part of James Olan Clark.

It was averred in each of the complaints that he was the agent, servant or employee of petitioner, and acting within the line of his employment. (Rec. pp. 186-7.)

After the institution of the three suits they were regularly removed from the State Court to the District Court of the United States for the Northern Division of the Middle District of Alabama.

See Agreement of Parties: (Rec. p. 2.)
And order of removal: (Rec. pp. 20-21, 157, 191.)

After their removal and before pleading to the merits, petitioner, appearing specially for that purpose alone, filed motions to quash the service of process and abate the suits as to it in each of the three cases. (Rec. pp. 22-26-158-162, 192-196.)

The return of the sheriff in each of the cases shows that as to petitioner service of copies of the summons and complaint was had "By leaving three copies with John Brandon, Secretary of State of the State of Alabama, the true and lawful agent or Attorney for the defendant, Dealer's Transport Company." (Rec. pp. 17, 154, 188.)

In each of the three complaints it is averred that the Dealer's Transport Company was a non-resident corporation, that its general office was 100 West 91st Street, Chicago, Ill., that the motor vehicle referred to in the complaint was being operated on a public highway in the State of Alabama by the Dealer's Transport Company or the Dealer's Transport Company was the owner thereof and it was being operated by themselves, which was equivalent to an appointment by Dealer's Transport Company of the Secretary of State of the State of Alabama, or his successor in office, as its true and lawful agent or attorney upon whom service of process should be had. "Wherefore, plaintiff prays that service be had upon the said Dealer's Transport Company as made and provided for by Section 199, Title 7, of the 1940 Code."

In two of the complaints it is averred that Dealer's Transport Company was not qualified to do business in the State of Alabama and had no designated agent upon whom service of process could be had. (Tr. pp. 153, 187.)

In each motion the return of the Sheriff showing service of the summons and complaint on the Secretary of State is set out and notice given by him to petitioner of such service, with which there was forwarded to petitioner, at its address in Chicago, copies of the summons and complaints. (Tr. pp. 22-3, 158-9, 192-4.)

Briefly stated, the grounds of the motion in each case are:

(1) Defendant is a foreign corporation under the laws of the State of Illinois, with a branch office in Atlanta, Georgia.

At the time of the alleged acts of negligence it was not engaged in business in Alabama, and had not, at that time nor since then, qualified under the Constitution and Laws of Alabama to do business as a foreign corporation in that State, and had not, at that time nor since then, maintained an authorized agent or agents residing in Alabama, upon whom service could be had as authorized by Section 232 of the State Constitution, and Title 10, Section 192, Code of 1940.

(2) At the time of the acts of negligence complained of it was not personally operating the automobile, truck or motor vehicle referred to in the complaints as causing the injuries complained of.

(3) That it was not the *owner* of the automobile, truck or motor vehicle referred to as causing the damages claimed, and had never owned the same, and that the same was the property of the United States Government.

That it was not the *owner* of the motor vehicle and was not operating it as owner thereof, either personally or by agent, at the time of the injuries complained of.

On the submission of the motions it was agreed by the attorneys for the plaintiffs and defendants that the facts alleged in the motions as to the return of the Sheriff as above set forth, that this petitioner was and is a foreign corporation under the laws of the State of Illinois, that it had not qualified to do business as a foreign corporation in the State of Alabama at the time of the alleged negligence, nor since then, under the Constitution and Laws of the State of Alabama, and had not, at that time nor since then, maintained an authorized agent or agents residing in the State of Alabama, upon whom service could be had as authorized by Section 232 of the State Constitution, and Title 10, Section 192, Code 1940, were true. (Rec. pp. 26-7.)

As to Dealer's Transport Company, it was agreed in open court that the testimony taken before the Court should be used in each motion.

The facts adduced on the hearing of the motions were, in substance:

The United States Government, prior to and at the time of the accident, maintained a military supply depot called Connelly Army Depot near Atlanta, Georgia, where motor vehicles for military purposes were assembled, from which they were moved to other depots, from time to time, or to other military places for military purposes.

In May, 1942, an order was sent from the Quartermaster General's Office in Washington, D. C., to transfer five Chevrolet cargo trucks from Army Depot, Georgia, to the Quartermaster at the New Orleans Army Air Base. Col. Stewart was the Commanding Officer in charge of the supply depot in Atlanta. Dealer's Transport Company was designated to carry out the order. This Company was doing business there in Atlanta. Memorandum was issued to the officer in charge of transportation to issue bill-of-lading to cover delivery by Dealer's Transport Company of the vehicles from Army Depot, Georgia, to Quartermaster, New Orleans Army Air Base. After the memorandum for issuance of the bill-of-lading was written the five vehicles were turned over to Dealer's Transport Company for delivery to New Orleans. The trucks belonged to the United States Government and were for military purposes. The Quartermaster in New Orleans was Distribution Officer or Quartermaster of Ordnance and Military Supplies for the Organizations stationed at the New Orleans Air Base. (Miller's Testimony, pp. 28-9.)

Dealer's Transport Company was employed by the Government but the employment of the person to deliver the motor vehicles was left to Dealer's Transport Company. The Government had a contract with the Dealer's Transport Company and a Government bill-of-lading as to each particular truck. (Rec. p. 30.)

The memorandum for the issuance of the bill-of-lading was issued in the office of the Atlanta Supply Depot by Col. Stew-

art the officer in charge of the Transportation Division. (Rec. p. 30.)

The Government paid the Dealer's Transport Company for the transportation of the trucks on the Government bill-of-lading. The trucks were turned over to Dealer's Transport Company on May 27th, 1942, under the bill-of-lading. (Rec. p. 31.)

The Government bill-of-lading (Rec. 72) offered in evidence, issued to Dealer's Transport Company, has a date stamp on it, June 10th, 1942. While bearing that date, the bill-of-lading is supposed to have been issued in advance of the order and prior to the delivery of the vehicles to Dealer's Transport Company for transportation. (Rec. 31-2.)

After the trucks were delivered to Dealer's Transport Company they were turned over by the Company to its employee, J. Olan Clark, for transportation on their own power and delivery at the Air Base in New Orleans. He was the driver and actually had charge of the convoy. He was driving the truck at the time the accident happened. Dealer's Transport Company did not own the trucks and had no interest in them except to transport them. (Rec. p. 32.)

When the trucks were turned over to Clark a temporary bill-of-lading was issued by Dealer s Transport Company reciting receipt of same from Army Depot, Conley, Georgia, for delivery to the Consignee, Quartermaster, New Orleans Army Air Base, and turned over to Clark, who was named as driver. It was necessary to have this bill-of-lading to comply with the rules of the Interstate Commerce Commission and the Interstate Commerce Law. The temporary bill-of-lading was to serve in lieu of the Government bill-of-lading until that bill-of-lading was turned over to Dealer's Transport Company. (Rec. 32-3.) The Government bill of lading is set out on pp. 72, et seq. of record.

Dealer's Transport Company was carrying a great many motor vehicles for the Government through every State in the Fourth Service Unit, embracing Alabama. It had not transport-

ed or delivered through the State of Alabama, out of the depot at Atlanta, any vehicles except military trucks for military purposes for the United States Government. They had only military business in Atlanta. In using the highways to transport these vehicles for military purposes they paid no tax of any sort. The Government would not pay any tax.

Upon submission the District Court made the following order overruling the motions:

> "It is therefore ordered and adjudged by the court that each of the motions to set aside and quash the service of the summons and complaint and the return of the same on each of the defendants in each of these actions be, and the same is hereby, overruled and denied, to which action of the Court each of the defendants excepts separately in each action." (Rec. p. 39-40.)

Upon overruling the motions to quash, the District Court made the following order consolidating the three actions:

> "It further appearing that these actions involve common questions of law and fact, it is ordered and adjudged by the court that the three above styled actions be, and they are hereby, consolidated for a joint hearing and trial of all of the matters in issue in said actions. This 5th day of February, 1943." (Rec. p. 40.)

PLEADINGS:

During the trial of the cases plaintiffs amended their complaints, against the defendants' objections, by adding count 3, claiming damages for wanton injuries. In the Mack Reese case this count is set out on pages 197-8 of the record.

The pleas of petitioner in each of the cases were failure of complaint to state a claim against the defendant, Not Guilty, and in short by consent, leave to give in evidence any matter that might be specially pleaded. (Rec. pp. 43, 164, 198-9.)

These pleas were permissible under Alabama Court decisions. *Moore vs. Williamson,* 210 Ala. 427, 98 So. 201, *N. Y. Life Insurance Co. vs. Sinquefield,* 231 Ala., 185-7, 163 So. 812.

On the trial in the District Court petitioner specially contended:

1. That in the two homicide cases there could be no recovery, because:

(a) The recoveries sought were under Sec. 123, Title 7, Alabama Code of 1940, known as the Homicide Act. That the damages recoverable were not to compensate anyone, but were penal, for the purpose of meting out civil punishment to the wrong doer, thereby preventing homicides; that at the time of the accident the United States was engaged in war with Japan, Germany and Italy; that the Dealers Transport Company was a Governmental agency of the United States, whose services had been requisitioned by the United States Government for the transporting of the motor vehicles involved in the accidents, that the State of Alabama had arrested and imprisoned its employee, Clark, the driver of the motor truck, who was acting within the line and scope of his employment, and as an additional punishment was seeking through the plaintiff administratrices to recover damages as civil fines for the acts complained of; that by so doing the State had impeded the war efforts and delayed the delivery of the trucks; that these acts were assertions of State sovereignty directly in conflict with the sovereignty of the United States in the exercise of the Nation's exclusive right to wage and carry on war against its enemies, and because of such conflict of the two sovereignties the suits could not be maintained, the sovereignty of the United States being supreme in such cases.

(b) That for the reasons above set out damages for wanton injuries under the wanton count were not recoverable in the Mack Reese case.

The testimony ins upport of these defenses is in part hereinabove set out in the evidence offered supporting the motions to quash. Other pertinent evidence is:

(a) The Government bill-of-lading showing the ralations between the petitioner and the United States Government. (Rec. p. 72-8.)

(b) Order of Col. Stewart, May 26, 1942, for issue of the bill of lading.

(c) Extracts from the testimony of R. E. Miller, Clerk in Supply Depot, Atlanta, Georgia:

"We received an order from Quartermaster General in Washington to deliver these particular vehicles in New Orleans. Our office selected Dealer's Transport Company to deliver them." (Rec. p. 78.)

Also testimony of this witness, Rec. pp. 80-1.

"Accomplishment of the Government bill-of-lading was delayed, but really has effect before the shipment was made." (Rec. p. 81.)

"As far as I know, Dealer's Transport Company was not engaged in any other business than delivering army trucks and things of that sort, exclusively for the Government there in Atlanta under orders of the Quartermaster General. The best of my knowledge, that is all they were doing." (Rec. pp. 81-2.)

"Transportation of these trucks was made to the New Orleans port of embarkation—" "They were used for transportation of troops and cargo, embracing food, clothing and shelter. They were all for military purposes and supplies. They were also equipped for transporting cannon." (Rec. p. 82.)

(d) Extracts from the testimony of Edwin Reiss:

"Am Branch Superintendent of Atlanta operations of Dealer's Transport Company, Southeastern area. The Company is incorporated in Chicago. I was ordered by our Vice-President and General Manager, who had conferred with the Quartermaster General, Ghormley, to go to Atlanta and immediately start the transporting of Government vehicles in the Southeast for the United States Army. I went." (Rec. p. 100.)

"We got instructions from the Government. Then we employed a driver to drive these vehicles. We had no interest

in them other than to deliver them in obedience to the instructions we had received." (Rec. p. 110.)

"The orders we had were the ones under which we took charge - - -" "The real bills-of-lading were sometimes delayed - - maybe five or six days after we delivered the trucks. They related back to the time we took charge of the supplies to be forwarded." (Rec. p. 111.)

"We came to Atlanta for the express purpose of delivering motor trucks and other vehicles for military purposes. We never endeavored to engage in any other business." Rec. pp. 112-13.)

"The Government controlled the speed for driving the vehicles, and the care we should take of them, and, if caught speeding, the Military Police could pick up the vehicles." (Rec. pp. 113-14.)

"Our instructions by the bill-of-lading were to transfer the vehicles from Atlanta to New Orleans. This accident occurred while they were en route." (Rec. p. 114.)

The testimony of James Olan Clark shows that he was driving the truck for Dealer's Transport Company at the time of the accident; that he was continuously engaged in driving motor vehicles for Dealer's Transport Company, and that such driving and delivering of motor vehicles was for military purposes only, and for nothing else. (Rec. pp. 86-7.)

At the conclusion of the evidence offered by both parties petitioner, in each of the three cases, moved the court for a directed verdict. (Rec. pp. 117-18, 165-6-, 199-200.)

The motions were overruled and exceptions reserved by petitioner. The jury rendered verdicts in favor of the respective plaintiffs, as follows:

Essie Mae Reese, as Admx., $10,000.00,
Lucy Ann Reese, as Admx., $6,500.00
Mack Reese, $8,500.00.

Judgments were entered in these respective cases for the amounts of damages assessed by the jury in each case. (Rec. pp. 129, 167, 201.)

Motions were made in each case by petitioner and the other defendant to set aside the verdicts and judgments, and also they further moved the court to enter judgment in favor of the defendants in accordance with their motions for directed verdicts at the close of all of the evidence in the cases. In the alternative, they moved the court for a new trial.

The motions were overruled and exceptions reserved. (Rec. pp. 129-31, 167-9, 202-3.)

The defendants, Dealer's Transport Company and James Olan Clark, took separate appeals from the judgments rendered against them.

Because of the consolidation of the suits in the District Court, the facts and evidence in each case being practically the same, to avoid duplication as far as possible and to abridge the record in the printing thereof, the parties on appeal agreed on the contents of the printed record and that the same should be printed in one book or volume. (Rec. 1-12.) The transcript of the record was printed as agreed and all the cases were docketed as one case No. 10,759. The appeals were submitted together and they were so treated and considered by the Court of Appeals. (See first page certified transcript of record.)

The cases were argued and submitted October 20, 1943, (Certified Tr. of Record 271.)

On November 12, 1943, an opinion was rendered in the Circuit Court of Appeals affirming the judgment of the lower court. (Certified Record 272-8.) On the same day, November 12, 1943, judgment in accordance with the opinion was rendered affirming the judgments of the District Court. (Certified Record 279.)

On November 29, 1943, petitioner filed its application for rehearing. (Certified Record 280-82.)

On December 15, 1943, the Court denied the application for rehearing. (Certified Rec. 291.)

Petitioner presents this petition for certiorari on March 11, 1944, within three months after denial of application for rehearing and within the time allowed by law. *Gypsy Oil Co. v. Escoe* 275 U. S. 498, 72 L. Ed. 393.

JURISDICTION

The basis on which it is contended that this court has jurisdiction to review the judgment of the Circuit Court of Appeals here in question the statutory authority conferred upon this court under Section 240 of the Judicial Code of the United States as amended (U. S. C. A. Title 28, Sec. 347), making it competent for this Court to review by certiorari upon petition therefor, the judgment here in question and generally judgments of the Circuit Court of Appeals of the United States.

QUESTIONS RESERVED

1. By its decision and judgment the United States Circuit Court of Appeals affirmed the judgment of the District Court in each of the cases. This decision was erroneous.

2. Petitioner was not personally operating the motor vehicle at the time of the accident resulting in injuries for which damages were claimed in the suit. It was therefore not amenable to process served upon the Secretary of State as its agent. The Circuit Court of Appeals erred in so adjudging.

3. James Olan Clark was personally operating the motor vehicle at the time of the accident resulting in the injuries for which damages were claimed. Petitioner was not the owner of the vehicle. Not being the owner, it was not amenable to process served on the Secretary of State. The Circuit Court erred in adjudging such service valid.

4. James Olan Clark was personally operating the motor vehicle at the time of the accident. Although petitioner was his principal, it was not amenable to process served on the Secretary of State. The Circuit Court of Appeals erred in adjudging the service valid.

5. Petitioner was and is a foreign corporation. At the time of the service of the summons and complaints on the Secretary of State it had no authorized agent in the State of Alabama upon whom the process could be served and it was not at the time of the service on the Secretary of State engaged in business in the State of Alabama. Such service on the Secretary of State was void. The Circuit Court of Appeals erred in adjudging it was valid.

6. The Circuit Court of Appeals errored by its decision and judgment holding in the two homicide cases that the fact that the defendant was the agent of the Federal Government carrying out its orders in the prosecution of the war was no defense to those suits.

7. The Circuit Court of Appeals erred in its judgment affirming the action of the District Court in allowing an amendment in the Mack Reese case authorizing recovery of damages for wanton injuries.

REASONS RELIED ON FOR ALLOWENCE OF WRIT.

1. The Circuit Court of Appeals has decided an important question on local law in a way in conflict with its plain meaning and in conflict with the weight of authority, said local law being the following provision of Sec. 199, Title 7, Alabama Code, 1940 viz:

SERVICE ON NON-RESIDENT OPERATOR OR OWNERS OF MOTOR VERICLES: - - The operation by a nonresident of a motor vehicle on a public highway in this state, or the operation on a public highway in this state of a motor vehicle owned by any nonresident and being operated by such nonresident, or his, their or its agent, shall be deemed equivalent to an appointment by such nonresident of the secretary of state of the State of Alabama, or his successor in office, to be such nonresident's true and lawful agent or attorney upon whom may be served the summons and complaint in any action against such nonresident growing out of any accident or collision in which such nonresident may be

involved while operating a motor vehicle on such public highway; or in which such motor vehicle may be involved while being operated on such public highway within the State of Alabama; and such operation shall be deemed a signification of such nonresident's agreement and equivalent to an appointment by such nonresident of the secretary of state of the State of Alabama, or his successor in office, to be such nonresident's true and lawful agent or attorney upon whom may be served all lawful process in any action or proceedings against such nonresident growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such public highway, or in which such motor vehicle may be involved while being operated on such public highway within the State of Alabama, so that any such summons and complaint against such nonresident which is so served shall be of the same legal force and effect as if personally served within the State of Alabama.

In its judgment and decision the Circuit Court of Appeals holds that James Olan Clark, who actually operated the motor vehicle involved in the accident, the basis of the suits, was the agent of petitioner and that constructive service upon the Secretary of State as agent for petitioner was valid, petitioner being Clark's principal and a non-resident, although petitioner was not the owner of the motor vehicle operated by Clark.

(a) This decision is in conflict with the plain meaning of the statute in question in that such service under the statute can be had only on the non-resident who actually operates the vehicle, or where the person so actually operating the vehicle is the agent of the owner of the vehicle. The statute does not apply or provide for service on the Secretary of State where the non-resident principal is not the *owner* of the vehicle. In this case Dealer's Transport Company was not the owner of the vehicle. It was owned by the United States and Dealer's Transport Company was merely a Governmental Agency for the transportation of the vehicle from Atlanta, Georgia, to the Army Air Base in New Orleans.

(b) It is in conflict with the decision of the United States Circuit Court of Appeals, Ninth District, in the case of *Hartley vs. Utah Construction Company*, 106 F. (2d) 953, and *Morrow vs. Asher*, 55 F. (2d) 365.

Construing State statutes with provisions similar to the Alabama Statute, it is also in conflict with decisions of Appellate Courts of other States construing statutes similar to the Alabama Statute.

Wallace vs. Smith, 265 N. Y. Supp. 253, 254-6;
O'Tier v. Sell, 256, N. Y. S. 403;
Flynn vs. Kramer, 271 Mich. 500, 261 NW, 77.

(c) Petitioner is a foreign corporation. At the time of the service of the summons and complaints on the Secretary of State, it was not engaged in business in the State of Alabama, had not complied with the requirements of the State Constitution for engaging in business in that State and had no authorized agent in the State upon whom the summons and complaints could be served.

Petitioner was without the jurisdiction of the Court. The provision of Section 199, Title 7, Code 1940 supra, for the service of process, had no application to petitioner and the service upon the Secretary of State as the agent of petitioner was void. The decision of the Court of Appeals affirming the judgment of the lower court is therefore erroneous.

(d) Said decision of the Circuit Court of Appeals is in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States, providing that no person shall be deprived of property without due process of law.

Goldey v. Morning News, 156 U. S. 518;
Mechanical Appliance Co. vs. Castleman, 215 U. S. 437, 441-2;
James-Dickinson Farm Mortgage Co. vs. Harry, 273 U. S. 119;
Rosenberg Bros. & Co. v. Curtis Brown Company, 260 U. S. 516, 67 L. Ed. 372.

It is in direct conflict with the following statement of the law in *Consolidated Textile Corporation vs. Gregory*, 289 U. S. 85, 77 L. Ed. 1047:

"In order to hold a foreign corporation not licensed to do business in a state responsible under the process of a local court the record must disclose that it was carrying on business there at the time of attempted service."

(e) Said decision is in conflict with the following provisions of Section 232 of the Constitution of the State of Alabama:

"No foreign corporation shall do any business in this state without having at least one known place of business and as an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business by service of process upon an agent anywhere in the state," and applicable decisions contsruing the same:

Farrior vs. New England Mortgage Security Company, 88 Alabama, 275, 7 So. 200;

General Motors Acceptance Corporation vs. Home Loan Company, 218 Ala. 681;

Ford Motor Company vs. Hall Auto Co., 226 Ala., 385, 387, 147 So. 603;

St. Mary's Oil Engine Company vs. Jackson Ice & Fuel Company, 224 Ala. 152, 138 So. 834.

At the time the summons and complaints were served on the Secretary of State as agent of petitioner, Dealer's Transport Company had not complied with the requirements of Section 232 of the Constitution of the State of Alabama. At that time it had in the State no authorized agent or agents. It had not been and was not engaged in business at the time of such service through its own authorized agents.

The above decisions hold that a foreign corporation without license to do business in the State of Alabama are not subject to suit in the State unless such corporations are actually en-

gaged in business through their own authorized agents at the time of the service of the summons and complaint.

2. At the time of the accident and the injuries for which recoveries were sought, the United States was engaged in war with Japan, Germany and Italy. The declaration of war against Japan was in December 1941 as follows:

"WHEREAS the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it

"RESOLVED, by the Senate and House of Representatives of the United States of America in Congress Assembled, That the State of War between the United States and the Imperial Government of Japan, which has thus been thrust upon the United States, is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States."

The declarations against Gemany and Italy are in similar form.

At the time the following pertinent statutes of the United States relating to the transportation of troops and supplies were and are now in force:

U. S. C. A. CODE, TITLE 10, SEC. 1361, pp. 233-4:

"Control of Transportation in time of war. The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

U. S. C. A. TITLE 10, SECTION 1362, p. 234:

"Preference to shipments of troops, etc.—In time of war or threatened war preference and precedence shall ,upon demand of the President of the United States, be given over all other traffic, for transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic."

U. S. C. A. TITLE 10, SECTION 1363, pp. 234-5:

"Control and supervision of transportation of troops, etc.—The transportation of troops, munitions of war, equipments, military property and stores through the United States, shall be under the immediate control and supervision of the Secretary of War and such agents as he may appoint."

U. S. C. A. TITLE 10, SECTION 72, p. 23:

"The Quartermaster General is charged with the storage and issue of supplies, with the transportation of the Army by land and water, including the transportation of troops and supplies by mechanical or animal means, with the furnishing of means of transportation of all classes and kinds required by the Army."

The suits in the two death cases were brought under Sec. 123, Title 7, Alabama Code 1940, known as the Homicide Act as follows:

"ACTION FOR WRONGFUL ACT, OMISSION, OR NEGLIGENCE CAUSING DEATH—A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be

maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions."

Proceedings under the above section of the Code are purely statutory. The right to sue is by virtue of the statute. There was and is no common law right to maintain such action in Alabama.

Kennedy v. Davis, 171 Ala. 609, 55 So. 104.

The damages recoverable are punitive of the act done. They are intended to stand as an example to deter others from the commission of homicide. The purpose is the preservation of human life, regardless of the pecuniary value of a particular life to the next of kin. The admeasurements of the recovery must be by reference to the quality of the wrongful act, the degree of culpability indicated in the commission of the act without any reference to or consideration of the loss or injury, the act may occasion the living.

L. & N. R. R. Co. vs. Perkins, 1 Ala. App. 376, 56 So., 105;
L. & N. R. R. Co. vs. Tegnor, 125 Ala. 503, 38 So. 510.

The position of the administrator in such cases is expressed in *Holt vs. Stollenwerck*, 174 Ala. 213, 216, 56 So. 912 as follows:

"He acts rather as an agent of legislative appointment for the effectuation of the legislative policy and upon recovery quasi trustee for those who stand in the relation of distributees to the estate strictly so called."

As to the two homicide cases, petitioner contends no recovery could be had because:

(a) At the time of the accident, the United States was at war with Japan, Germany and Italy. Under the statutes above cited, the Quartermaster General and his sub-ordinates had full power to requisition the services of petitioner and did req-

uisition them for the purpose of transporting for military purposes in prosecution of the war, the motor vehicles involved in the accident from the Conley Army Supply Depot near Atlanta to the Air Base in New Orleans.

(b) Petitioner received orders to transport and deliver these motor vehicles and turned the same over to its employee, James Olan Clark, for that purpose. Clark was in charge of the convoy and of the particular motor vehicle, driving it at the time of the accident. Dealer's Transport Company was a governmental agency for the purpose of delivering the motor vehicles and Clark was a sub-agent of the government acting within the line and scope of his employment and agency. The acts of the State of Alabama in imprisoning and prosecuting Clark was an exercise of State Sovereignty. Likewise the prosecution of suits by the administratrices of Isaac and Sarah Reese was an exercise of State Sovereignty growing out of the same transaction, the primary purpose of which was to punish petitioner and Clark by imposing civil fines upon them for the acts causing their deaths. These assertions of sovereignty by the State interfered with and impeded the progress of the war by reason of the prosecution and imprisonment of Clark resulting in delay of delivery of the motor vehicles and also by the actions resulting in verdicts and judgments imposing civil fines in the nature of penalties against Clark and petitioner, who at the time were agents of the government acting under the orders of the military authorities for the transportation and delivery of the motor vehicles.

To requisition the service of Dealer's Transport Company no sterotyped form of order was necessary. It might be placed under the form and terms of polite request. It is left to the discretion of the government to determine the placing of orders and how its intentions are to be communicated or by writing. They may be made known by telegram, telephone or letter. The acts of Congress do not prescribe the method of communication nor its form. *Roxford Knitting Co. v. Moore and Tierney* 265 F. 177, 188. (Decided by U. S. Circuit Court of Appeals 2nd. Circuit March 18, 1929.)

In requisitioning the services of petitioner and treating it as an agent of the Government to deliver the motor vehicles to the Air Base in New Orleans, the United States Government, acting through its duly constituted authorities, was exercising its sovereign power to wage war in pursuance of the declaration of Congress and to engage in an all out effort to win the war. Petitioner's contention is that the exercise by the state of its sovereignty in the manner above set forth was in direct conflict with the sovereign power of the United States to wage war and an unwarranted interference with the war effort and that decision of the Circuit Court of Appeals to the contrary is error.

As a further reason for granting the writ, petitioner contends:

(1) The power granted by the Constitution to the Federal Government to wage war includes the power to conduct it to a successful conclusion. The Government has plenary and exclusive power over all matters pertaining to war, with which no state or its courts can interfere, and the Congress in the protection of the common good, may enact all such legislation as in its wisdom it deems essential to the prosecution of war and may employ any means calculated to wage the war successfully.

67 C. J. Sec. 55, p. 365-6.

(2) The State has no right to hinder or embarrass the United States directly or indirectly in carrying out its power to make war and no local statute can be permitted to stand as a bar to the effective exercise of the war power by the Federal Government. War measures are the exclusive prerogative of the National Government and are not within the purview of the regulatory power of the State.

67 C. J. Sec. 61, page 372

The decision of the Circuit Court of Appeals is contrary to the above principles of law and therefore erroneous.

(3) Because of conflict between State and National Sovereignty, the decision of the Circuit Court of Appeals is con-

trary to the following principles of law announced in Tarble's case, 13 Wallace, 406, 407:

"Powers of the General Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye."

"The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The constitution and laws passed in pursuance of it, are declared by the constitution itself to be the supreme law of the land and the judges of every State are bound thereby, 'anything in the constitution or laws of any state to the contrary notwithstanding.'"

(4) The decision is contrary to the following principles of law announced in the cases of *Tennessee v. Davis* 100 U. S. 257, In Re Neagle, 135 U. S. 1, *U. S. v. Casey* 247 F. p. 367, *U. S. v. Pappers* 252 F. 55 (9th U. S. Circuit Court of Appeals):

(a) The general government has power to protect itself in exercising its constitutional powers. It can act only through its officers and agents. They must act within the states.

When acting within the scope of their authority, they are not amenable to State courts, but to Federal Courts and authority for their acts. Were it otherwise, state legislation might be unfriendly, might affix penalties to acts done under immediate direction of the national government, might deny the authority conferred by Federal law, or administer Federal law in such

manner as to paralyse the operations of the government.—*Tennessee v. Davis* 100 U. S. 262-3-

(b) "Were the power to conduct war and to maintain efficiency in the army dependent in any degree upon the pleasure of the states, it would in all probability be unequally exerted and the government might suffer disaster by obstruction to an adequate exercise of such power on the part of unfriendly states." *U. S. v. Casey* 247 F. p. 367.

(5) The recoveries in the two death cases were for penalties in the nature of civil punishment under the Alabama Homicide Act. They were against Petitioner and Clark its employee. At the time Petitioner was a governmental agency for carrying on the war and Clark was a sub-agent of the government. Both were acting within the scope of their agency and Clark was transporting the motor vehicle under military orders for delivery to the air base in New Orleans for military purposes, when the accident occurred. Such damages were not recoverable. The decision of the Circuit Court of Appeals holding they were recoverable was erroreous and in conflict with the following Federal and State decisions:

Missouri Pacific R. R. Co. v. Ault, 256 U. S. 554;
Howard v. Davis 209 Ala. 113; 95 So. 554;
Heidtmueller v. L. & N. R. R. Co. 210 Ala. 538 98 So. 792.

3. Said Circuit Court of Appeals has decided against Petitioner an important question of federal law which has not been, but should be settled by this Court, viz:

Petitioner by proper military authority was directed to transport five motor vehicles on their own power for military purposes from a military supply depot near Atlanta, Georgia, and deliver same at the Army Air base in New Orleans. Under these orders Petitioner's employee was placed in charge of the convoy and was the driver of one of the vehicles. While driving it and while acting within the scope of his agency the vehicle and driver became involved in an accident on a public highway in Alabama resulting in the death of two persons and

injury to another. There was no common law liability arising from the deaths of the two persons, but an Alabama statute authorizing in case of negligence recovery by their administrators of damages as penalties. At the time of the accident the United States was engaged in war with Japan, Germany and Italy. Petitioner insisted it was an agent of the Government transporting the vehicles under military orders for military purposes, that it was liable only to the federal government for its acts and that it was not liable for the penalties recovered under the state statute. The Circuit Court of Appeals held it was liable. This question has not been decided by this Court.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of, this Honorable Court, directed to United States Circuit Court of Appeals, Fifth District, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings of said Circuit Court of Appeals in this cause, and that upon such review this Court will reverse the judgment of the United States Circuit Court of Appeals of the Fifth Circuit and hold that the service of the summons and complaints in each of the three cases wherein petitioner was made defendant upon the Secretary of State of Alabama as agent of petitioner was invalid and of no effect, and also hold that the plaintiffs in the two homicide cases were not entitled to recover and that the plaintiff Mack Reese in his suit was not entitled to recover for wanton injuries under the facts disclosed by the record, that petitioner was entitled to a directed verdict as to the two homicide cases and that petitioner may have such other and further relief or remedies in the premises as to this Court may seem appropriate; and petitioner will ever pray, etc.

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BRIEF AND ARGUMENT IN SUPPORT OF THE FOREGOING PETITION FOR CERTIORARI.

SERVICE OF THE SUMMONS AND COMPLAINTS ON THE SECRETARY OF STATE AS AGENT OF PETITIONER WAS INVALID.

This service was had under Section 199, Title 7, Alabama Code, 1940.

Analysis of this Code provision shows that the process may be served on the Secretary of State in two instances:

1. Where the motor vehicle is operated by a non-resident.

2. Where a non-resident is the owner of the motor vehicle and the same is operated by him or by his, their or its agent.

Petitioner was not the owner of the motor vehicle involved in the accident. It was owned by the United States. It was, therefore, not operated by petitioner as owner either in person or by agent. This being true, constructive service could not be had on the Secretary of State as agent of the owner. This is conceded in the opinion of the Circuit Court of Appeals.

The following excerpts from the court's opinion shows this:

Dealers Transport Co. v. Reese 138 F. (2) 638.

(1) "Defendant Clark was an employee of the Corporation and was the driver of the Army truck which produced the injuries. Several trucks were being driven by employees of the Corporation from Ft. McPherson, Georgia, to New Orleans, Louisiana, at the employment and instance of the Army and for redelivery at New Orleans to the Army and were the property of the United States." Opinion p. 3.—Cert Tr. 274.

(2) . . . "the first phrase of the Act thoroughly covers the operation of a motor vehicle by a corporation which can only operate a vehicle through an agent. There exists no necessity nor purpose in the disjunctive phrase 'or the operation (.....) of a motor vehicle owned by such non-resident and being operated by (such non-resident) or his, their or its agents,' of the words 'such non-resident,' which we place in

parentheses. These words appear to be surplusage in view of the language of the first phrase—" Opinion p. 4, Cert Tr. 275.

(3) "The test is operation—not ownership." Opinion p. 5.

The Court is in error in stating that the trucks were being driven from Ft. McPherson, Georgia. They were being driven from the supply depot near Atlanta under the orders of the Military Officers in command and charge of that depot. Fort McPherson is not mentioned in the entire record. Opinion p. 5, Cert Tr. 276.

From the above excerpts the Court effectively and conclusively holds.

(1) The United States was the owner of the trucks.

(2) In determing the validity of service on the Secretary of State the question of ownership of the truck is not material and is eliminated.

Eliminating the operation clause by the owner or agent, on page 4 of the opinion of the Courts says the statute may be read substantially as follows:

> "The operation by a nonresident of a motor vehicle on a public highway in this state. ( ) shall be deemed equivalent to an appointment by such nonresident of the secretary of the State of Alabama—to be such nonresident's true and lawful agent or attorney upon whom may be served the summons and complaint . . ."

From the statute as above set out by it the Court holds in effect that a nonresident, individual, or corporation as principal may operate a motor vehicle by agent on a public highway in Alabama and in case of accident, where the car is driven by agent, may be brought into Court by service of process on the Secretary of State, although in the statute itself no reference to an agent is made. The only way the statute could be made to apply to the agent of the nonresident principal, is to read into it a provision to the effect that where the motor vehicle is driven or operated by the agent the nonresident principal may be made a party by constructive service on the Secretary of State.

Expressly setting out in it the provision, which the Court by implication holds, the clause of the statute authorizing the substituted service would read in substance as follows:

"The operation by a nonresident 'in person or by agent' of a motor vehicle on a public highway in this state, shall be deemed equivalent to an appointment by such nonresident of the Secretary of State of the State of Alabama, - - - to be such nonresident's true and lawful agent or attorney upon whom may be served the summons and complaint - - -"

Accepting the Court's version of the statute and its contents as set out on page 4 of the opinion, has the Court the power to read into the statute a provision extending its terms not only to the non-resident actually operating the motor vehicle but also to its operation by the agent so as to make constructive service on the Secretary of State binding on the non-resident principal who does not actually operate it?

If the uniform decisions of other Courts construing similar statutes are of any weight, the holding of the Court of Appeals is erroneous.

In reaching a correct conclusion the Court will bear in mind that this and similar statutes are in derogation of the common law and are to be strictly construed, *Webb Packing Co. vs. Harman*, (1937) 38 Del. 476, 193 A. 596; *Jermaine v. Graf*, (1939) 225 Iowa, 1063, 283 N. W. 428; *Spearman v. Stover* (1936 La. App.) 170 Sou. 259; *Flynn v. Kramer*, (1935) 271 Mich. 500, 261 N. W. 77; *Vecchione v. Palmer*, (1936) 249 App. Div. 661, 291 N. Y. S. 537.

Such statutes may not be extended by implication to non-residents not coming within their terms. *Jermanine vs. Graf*, *Flynn v. Kramer*, supra.

Prior to a later amendment Section 52 of the Vehicle and Traffic law of New York, Consol. Laws, C. 71 in force in 1929 provided for constructive service upon a non-resident in an action "growing out of any accident or collision in which such non-resident may be involved while operating a motor vehicle"

—This New York statute was substantially the same as the Alabama statute paraphrased by the Court of Appeals on page 4 of the opinion.

Construing it, the New York Courts held the application of the statute was limited to those non-residents who personally drove or operated their automobiles. *Wallace vs. Smith*, 265 N. Y. S. 253, 254-6; *O'Tier vs. Sell*, 252 N. Y. S. 400, 403.

In the case at bar Clark was the non-resident and personally operated the truck. The statute applied to him alone.

In *Flynn vs. Kramer*, 271 Mich. 500, 261 N. W. 77, it was held that substituted process against non-residents who "operate" their motor vehicles in the state was held to signify a personal act in working the mechanism of the car and that jurisdiction was not obtained of a non-resident car owner in an action which arose when he was not driving his car or in it, but was a passenger in another car which followed a considerable distance in the rear of the car owned by him.

After the above cited decisions were rendered the New York and Michigan statutes were amended by adding the words:—"or the operation on a public highway in this state of a motor vehicle—owned by a non-resident if so operated with his consent express or inplied."—Vehicle and Traffic Law N. Y. Sec. 52; Comp. Laws Mich. Suppl. 1935, Sec. 4790.

The direct question here up for decision was passed upon in *Morrow vs. Asher*, 55 F. (2) 365.

In that case the Texas statute as quoted in the opinion, reads in part as follows:

> "The acceptance by a non-resident of this State of the rights, privilages and benefits of the public highways—as evidenced by his operating a motor vehicle or motorcycle on any such public highway—shall be deemed equivalent to an appointment by such non-resident of the Chairman of the State Highway Commission of this State or his successor in his office to be his true and lawful attorney upon whom may

be served all lawful process in any civil action or proceeding against him growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle—on such public highway—and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served upon him personally," etc.

The action in the above case was by Morrow, a citizen of Texas, against Asher, a citizen of California, it being averred that one E. E. McNey was the agent, servant and employee of Asher and at the time of the accident was operating a car owned by the defendant using the highways of Texas for transporting a car from Texas to California,—Substituted service was had on Asher by service on the Chairman of the State Highway Commission.

The defendant Asher appeared specifically and moved to quash the service upon the ground he was not "operating" a motor vehicle at the time of the alleged injury and that the statute means exactly what it says.

With reference to this the Court said:

"If the statute means that the use of the Texas highways by a servant or an employee, renders the employer or principal, liable for a tort committed by such servant or employee to be served in the manner indicated, then this motion should be overruled. If it only means that the person who actually operates the car at the time of an alleged tort could be so served, then and in that event the motion should be sustained."

In an able and common sense discussion of the question with citations of pertinent decisions, the learned district judge held the motion to quash good and sustained it.

We call the Court's attention to the following excerpts from the opinion:

(1) "But, when a law making body passes a statute which, because of necessity, subjects a person to a liability to which he was not theretofore subject the statute should be strictly construed."

(2) "If Asher was not operating in that sense upon the Texas highway, he could not be served by notice upon the Chairman of the Highway Commission. To hold that such notice was service upon him under the present facts would be to read into the law what the Court of Appeals of New York refused to read into the New York statute in the case of *O'Tier vs. Sell*, 252 N. Y. 400, 169 N. E. 624, 625."

In the same case Judge Atwell quotes the following from Judge Lehman's opinion in the New York case of *O'Tier v. Sell*:

"We are asked by construction to read into the wrods 'while operating a motor vehicle' an additional clause, 'or while the car is being operated with his permission, express or implied.' That we may not do."

We may here add that the New York and Texas statutes above referred to were enacted and construed by the decisions above cited before the Alabama statute patterned after them was passed. This being true, the construction placed upon them by the Courts is to be treated as incorporated therein. *Kerner v. Thompson*, 356 Ill. 149, 6 N. E. (2) 131.

To the same effect is *Hartley v. Utah Construction Co.*, 106 F. 2d, 953.

The Oregon statute under which constructive service on Utah Construction Co., was upon the Secretary of State of the State of Oregon, was substantially the same as the Alabama statute as set out on page 4 of the Court's opinion.

The car was owned by the Utah Construction Company, a Utah corporation. It was being operated by one Lawler, its vice-president in the state of Oregon at the time of the accident. Lawler was accompanied by his wife. They were residents of California.

The Utah Construction Company moved to quash service of summons on the ground that the Oregon statute applied only to non-residents personally operating an automobile in Oregon. The District Court granted the motion and quashed the attempted service of summons. The case was appealed to the Ninth Circuit Court of Appeals. That Court, Hanes, Circuit Judge rendering the opinion, affirmed the decision of the District Court.

The fourth ground of the motion to quash sets up that Dealer's Transport Company is a foreign corporation, that it had never qualified to do business in Alabama and had no agent in Alabama.

The only business it ever did was transporting trucks through the state for the government. This certainly was not doing business in the state, in the sense of exercising corporate functions. Under this state of affairs the motion to quash and abate the suits should have been granted. This is for the reason that the corporation never acquired a domicile in the state and jurisdiction of its person could not be acquired unless it was doing business in the state at the time of the attempted service of process on the Secretary of State.

Goldey v. Morning News, 156 U. S. 518;
Consolidated Textile Corporation vs. Gregory, 289 U. S. 85, 77 Law. Ed. 1047, 53 S. Ct. 529, is directly on the point. We quote from Sec. (3) of the opinion:

"In order to hold a foreign corporation not licensed to do business in a state responsible under the process of a local court the record must disclose that it was carying on business there at the time of attempted service."

The principle above contended for are sustained by an unbroken and long line of decisions of the Supreme Court of the United States and the Supreme Court of Alabama.

The Alabama decisions are in line with the decisions of the Supreme Court of the United States. These decisions hold that a foreign corporation is subject to suit within the State

only where it is doing business in the State at the time of service of process.

Ford Motor Co. vs. Hall Auto Co. 226 Ala., 385, 387, 147 So. 603;
Davis vs. Jones, 236 Ala. 684, 687, 184 So. 896;
St. Mary's Oil Engine Company vs. Jackson's Ice & Fuel Company, 224 Alabama, 152, 138 So. 834.

In the last named case the foreign corporation had not qualified to do business in the State as required by Section 232 of the Constitution but the Supreme Court of Alabama held that it was subject to suit, because at the time the process was served it was actualiy engaged in business by agent in the State of Alabama.

There are numerous other decisions to the same effect.

Certainly the record does not disclose that Dealer's Transport Company was carrying on business in Alabama at the time of the attempted service.

They apply to actions of tort as well as assumpsit.

James-Dickinson Farm Mortgage Co. vs. Harry, 273 U. S. 119.

The fact that the cause of action arose in Alabama is immaterial.

Rosenberg Bros. & Co. vs. Curtis Brown Co., 260 U. S. 516 Sec. (3) of opinion.

The death suits are under Section 123, Title 7, Code of Alabama 1940, known as the homicide act. It confers no personal or property rights upon the deceased or his heirs. Its purpose is to prevent homicides by civil punishment. The damages awarded are civil fines supplementing the criminal laws.

Appellants were acting under orders of the Quartermaster General of the United States and other military authorities and the Government Bill of Lading which, though issued later, related back and embraced the terms prescribed by the government for the transportation of the trucks.

Dealer's Transport Company was no longer a public carrier in this enterprise. The general public could not command its services. Its allegiance was to the government and military authorities, whose orders it dared not disobey. Under these orders the trucks were to be transported on their own power from the supply depot in Georgia to the Air Base in New Orleans. For this the public highways were necessary. Neither the United States Government nor appellants were required to obtain the state's consent to use them.

Being at war the state's rights to use the highways were subordinate to the sovereign power of the nation.

The government could act only through agents. At the time of the unfortunate tragedy, Clark was in charge of the trucks under military orders to deliver them at their destination. That he was acting within the line and scope of his authority is not questioned. It is averred in the complaints. That two lives were lost and another seriously injured is deplorable. But Clark's mission was of supreme importance. Notwithstanding the accident it was his stern duty to carry out his orders and deliver the trucks.

Instead of two deaths and a wounded man, thousands of soldiers and citizens had been killed by a cruel and merciless foe. Other thousand had been crippled and mutilated leaving many in far worse condition than a man with a broken leg.

A world tragedy was being enacted. The life of the nation was threatened. Clark was only one of thousands of other agents and instrumentalities of the government in the all out war effort to punish the murderers of the nation's soldiers, sailors and citizens, prevent further slaughter and save the country from invasion. These were not idle dreams, but stark realities and the slaughter continues.

Under these conditions, the state was wtihout right to stop Clark on his mission or through its courts imprison and impose upon him and petitioner staggering civil penalties.

What the state did in the exercise of its sovereignty, retarded the war effort and clashed with national sovereignty.

> "A state has no right to hinder or embarrass the United States, directly or indirectly, in carrying out power to make war, and no local statute can be permitted to stand as a bar to the effective exercise of the war power of the federal government. Moreover, war measures are the exclusive prerogative of the national government, and are not within the purview of the regulatory power of the state."
> 67 C. J. Sec. 61, page 372.

No more effective method of impeding the war effort can be imagined than arresting, imprisoning and levying heavy civil fines upon the government's agents and leaving its trucks sorely needed in prosecution of the war stranded by the roadside.

If the courts of the nation, in upholding its sovereignty, could deny the state of California the right to try Neagle, a deputy marshal, for murder, they have the same power to protect an agent of the government obeying military orders and acting within the scope of its authority at a time when the government was fighting for its existence.

Surely, if the courts could strike down a law of the state of New York levying a tax on $600,000.00 owing by the federal government to Astoria Light H. & P. Company (30 A. L. R. 1458) under a contract for manufacturing gas masks during World War 1, because such manufacture was in aid of the government carrying on war against Germany, certainly the courts have the right to deny enforcement of a statute permitting the levying of a civil fine or penalty enacted for the express purpose of imposing penalties in cases where no common law rights of the deceased or their heirs had been invaded.

This is far different from those cases where the common law rights of individuals have been violated by a government agent acting beyond the scope of his authority. In such cases an action would lie for actual damages.

We respectfully insist that under the uniform decisions of this Court and other decisions and statutes which we have cited, service of the summons and complaints on the Secretary of State as the agent of petitioner were void, that plaintiffs were not entitled to recover in the two homicide cases, that plaintiff, Mack Reese was not entitled to recover punitive damages and that petitioner was and is entitled to the directed verdicts requested in each case and to a dismissal of the actions of the three plaintiffs.

Respectfully submitted,

D M Powell Greenville, Ala.

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OF COUNSEL:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 776

DEALER'S TRANSPORT COMPANY,
Petitioner,

vs.

ESSIE MAE REESE, AS ADMINISTRATRIX OF THE ESTATE OF ISAAC REESE, DECEASED, ET AL.

RESPONDENTS' BRIEF OPPOSING GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

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HILL, HILL, WHITING & RIVES,
Of Counsel.

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The opinion of the Circuit Court of Appeals is officially reported as *Dealer's Transport Co.* v. *Reese; Clark* v. *Same,* 138 F. (2d) 638.

Statement of the Case.

Petitioner was incorporated under the laws of Illinois many years before the War began (R. 23, 27, 34, 113). It engaged in business as a common carrier transporting motor vehicles from factory to dealer (R. 34, 36, 113). After the War came on it established a branch office in Atlanta, Georgia, and it transported as a common carrier for hire or reward trucks for the Government from Atlanta

to different other parts of the country (R. 30, 36, 111). In these transactions it issued its standard bill of lading wherein its liabilities and rights set forth were the same as any other common carrier for hire or reward (R. 34, 35). It selected its own employees or drivers to transport the trucks, and to do everything else pertaining to them (R. 30, 78, 79). It routed the trucks as it saw fit (R. 35, Sec. 2) and gave its own orders as to how to transport the trucks, and when and who would transport them as far as its employees were concerned (R. 110). Petitioner had charge of the vehicles and full control of them except that the Government required that they should not exceed a speed limit of thirty-five miles an hour and should be kept properly oiled and greased and of course limited by the instructions in the bill of lading as to the place of receipt and delivery of the trucks (R. 113, 114). The Government paid the petitioner a fixed rate for the transportation of the trucks (R. 31). In the language of petitioner's Branch Superintendent, "The Government paid us the same as any other shipper paid us for hauling freight for it, paid so much for hauling freight" (R. 113).

Petitioner never qualified under the Constitution and laws of Alabama to do business in Alabama, and has never designated or maintained an authorized agent in this State upon whom service could be had (R. 24, 27).

On May 27, 1942, the United States Government delivered to petitioner in Atlanta, Georgia, the truck involved in this case, and four other trucks to be transported by petitioner as a common carrier to New Orleans (R. 29). Petitioner upon receipt of the trucks issued its bill of lading, and routed the trucks over Highways 29, 80, 31 and 90 (R. 34, 35). Petitioner put Clark to drive the truck involved in these cases, and also put him in charge of the convoy of trucks then leaving Atlanta (R. 32).

Clark left Atlanta between 11:30 and 12 o'clock on the night of May 27th (R. 88). The next morning about 7 o'clock in Lowndes County on Public Highway 80 of the State of Alabama, between Montgomery and Selma, the tragedy, the foundation of these suits, took place (R. 89).

There was a wagon drawn by two mules going uphill on this Highway. The mules were walking. In the wagon were four human beings, Isaac Reese, the driver, Mack Reese, Elsie Mae Reese and Sarah Reese. These people were on their way to work their farm. The day was dry and sunshiny. The view behind the wagon was clear and unobstructed for a distance of a half to three-quarters of a mile (R. 97). The wagon was traveling on the right-hand side of the road. The right wheels of the wagon were off of the pavement on the shoulder of the road, the dirt part of the road, on an average of two feet four inches "up to the point of contact." Along this part of the road and for 102 paces behind the place of contact there was the yellow line which said to the drivers of vehicles on that highway, "Don't pass here." The wagon was in the lane of this yellow line. The next thing that happened is the truck driven by Clark struck the wagon from the rear. The next thing we see is an absolutely demolished wagon and nearby Isaac Reese, a bleeding and dying man; Sarah Reese, a dying woman, her left leg severed and "just a piece of skin holding it dangling in the air"; Mack Reese, an unconscious, broken-legged and otherwise injured man; a down and dying mule; another mule dying with a board driven through its body and extending about two feet on each side, and then a truck 132 feet up beyond the demolished wagon with the tire of the left rear wheel of the wagon on its right front bumper. Then we hear Clark say to those present that he was not asleep; that he pulled out to pass the wagon and a mule became frightened and bolted and jerked the wagon in front of him. He was carried to jail by the Sheriff

of the County and continued to adhere to this story (R. 44-70). He changed his statement, however, upon the trial of the cases and said he was asleep (R. 90).

On June 10, 1942, after the accident the Government issued its bill of lading which in no way changed petitioner from what it was, to wit, a common carrier of freight for hire or reward (R. 72-77).

The personal representatives of Isaac Reese and Sarah Reese brought suits for their respective wrongful deaths against petitioner in the Circuit Court of Montgomery County, Alabama. These suits were predicated upon the rights conferred upon them by Section 123, Title 7 of the Alabama Code copied in the Appendix of this brief. Mack Reese brought suit against petitioner for the serious and permanent injuries sustained by him. The complaints as amended each contained two counts, one based on simple negligence of Clark, and the other on his willfulness or wanton conduct. The plaintiffs in order to obtain service of process on petitioner proceeded as authorized by Section 199, Title 7 of the Alabama Code copied in the appendix of this brief. The cases were removed from the State Court to the Federal Court, and petitioner there moved to quash the service of the summonses and complaints upon it. The Court overruled these motions. The causes of action were consolidated. Three separate verdicts were rendered, one in favor of the personal representative of Isaac Reese for $10,000.00, one in favor of the personal representative of Sarah Reese for $6,500.00, and one in favor of Mack Reese for $8,500.00. Judgments were accordingly rendered.

The contentions of the petitioner here may be summarized as follows:

1st. Service of process on petitioner under Section 199, Title 7, Alabama Code 1940 was invalid (a) because petitioner corporation did not personally operate the motor

vehicle and did not own the legal title to it, and (b) because petitioner corporation had never qualified to do business in Alabama; and

2nd. Petitioner was privileged and immune from liability in each of the death cases and from punitive damages in the personal injury case because it was acting for the Government in transporting the trucks for the use of the Army in time of war.

Process.

The statute Section 199, Title 7 of the Alabama Code in pertinent parts is as follows:

> "The operation *by a non-resident* of a motor vehicle on a public highway in this state, *or the operation on a public highway in this state of a motor vehicle owned by a non-resident and being operated by such non-resident, or his, their or its agent*, shall be deemed equivalent to an appointment by such nonresident of the secretary of state of the State of Alabama, or his successor in office, to be such nonresident's true and lawful agent or attorney upon whom may be served the summons and complaint in any action against such nonresident growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such public highway; *or in which such motor vehicle may be involved while being operated on such public highway within the State of Alabama.*" (Emphasis ours.)

The statute further provided that it was not applicable to a foreign corporation that had qualified to do business in Alabama and designated an agent upon whom service could be had. This statute was enacted and became law in 1935. Respondents followed the statute to its letter and in its spirit in procuring service upon petitioner. This is not questioned by petitioner.

Does the word "nonresident" in this Statute include a nonresident corporation as well as a nonresident individual? The answer is manifestly "Yes" because (a) the word "**non**resident" is used with the same meaning throughout the Statute; (b) the use of the word "its" in the expression "such nonresident, or his, their or *its* agent" (emphasis ours) would be inappropriate or improper if the statute did not apply to a nonresident corporation; (c) by expressly providing that the statute should not apply to certain foreign corporations, i. e., those which had qualified to do business in Alabama and maintained an authorized agent upon whom service could be had, the legislature made its intention clear that it should apply to all other foreign corporations, those which had not so qualified.

In the case of *Jones* v. *Pebler*, 371 Ill. 309, 125 A. L. R. 451, 454, in construing the word "nonresident" in a similar statute, the Supreme Court of Illinois said:

> "The word 'nonresident' appears without definition, does not purport to be limited to nonresident natural persons, and is obviously broad enough to include every nonresident, individual or corporate, owner or non-owner, using and operating a motor vehicle over Illinois highways. In short, a non-resident, within the contemplation of Section 20a may be a non-resident corporation or an individual member of a non-resident partnership."

In that case, the Illinois Court further pertinently observed:

> "Section 20a expresses the manifest legislative intent of conferring jurisdiction of suits against nonresident motorists on the courts of Illinois to the end that compensation for injuries to local residents may be obtained. Admittedly, the policy is as desirable when the driving is done on behalf of a non-resident by an agent, chauffeur, servant, or a third person with

consent, as when by the nonresident himself. 'The potential harm,' it has been well said, 'is as great whether the nonresident owner himself or another be driving his car, and the necessity for resorting to substituted service is just as pressing.' Culp, 'Process in Action Against Non-Resident Motorists,' supra. Again, it has been pertinently observed: 'The large proportion of cars owned and operated by foreign corporations and partnerships was as obvious to the legislature as was the fact that a corporation can perform such physical acts as operating a car only through agents.' "

The Arkansas statute and the New York statute providing for constructive service of process on nonresident motorists, have each been held to apply to nonresident corporations as well as to natural persons. *Bischoff* v. *Wm. Schnepp* (1930) 249 N. Y. Supp. 49, 139 Misc. 293; *Alexander* v. *Bush* (1939) 199 Ark. 562, 134 S. W. (2d) 519.

The conclusion is inescapable that the Alabama Statute applies to nonresident corporations as well as to nonresident individuals. With that construction established, let us consider the meaning of each of the two acts which the statute says shall be deemed equivalent to an appointment by such nonresident of the secretary of state as an agent to receive service of process.

1st. "The operation by a nonresident (corporation) of a motor vehicle on a public highway in this state." (Parenthesis supplied). As said by the Court of Appeals, "The proposition that a corporation can operate a motor vehicle only by its agent is not open to dispute."

2nd. "The operation on a public highway in this state of a motor vehicle owned by a nonresident and being operated by such nonresident, or his, their or *its* agent." (emphasis ours).

If petitioner is right in its contention, then it would follow that a nonresident thief of an automobile, or a nonresident corporation or individual who, in good faith, bought an automobile from a thief, or a nonresident individual or corporation who borrowed an automobile from another, or a nonresident individual or corporation who rented or hired an automobile from another, or a nonresident individual or corporation who obtained possession of an automobile under a conditional sale contract wherein the title was reserved until the full agreed-on purchase price was paid and who had paid all of this price except one dollar, or a nonresident individual or corporation bailee who had dominion and control of an automobile, *could by his or its agent operate* the automobile upon the highways of Alabama and be immune from service or process upon it. Why? Because petitioner says the "legal title" was not in him or it, but was in one from whom he or it obtained the automobile.

It is certain that the Legislature in the passage of the law in using the word "owner" was not dealing with the person who had the legal title to the automobile, but with the person who was in possession of or had dominion over the automobile with the power to operate or direct its operation. The Legislature was not aiming at nor concerned with who would prevail in an action involving the title to the automobile, but was aiming at and concerned with who would be liable for the operation of the automobile on the highways of Alabama.

In the case here the legal title to the automobile was in the Government, but the Government under contract with petitioner delivered the automobile to petitioner as an independent contractor or common carrier to be transported to New Orleans. When this was done the relationship of bailor and bailee was created. The bailee then became the owner of the automobile *as to all of the world except as to*

the bailor. The bailee and not the bailor was then responsible and liable for the operation of the automobile. Authorities are not needed to support the foregoing statements, yet we will take the liberty of here briefly referring to some of them.

In referring to an Alabama statute, the Court of Appeals of Alabama in the case of *Lockhart* v. *State*, 6 Ala. App. 62, speaking through its presiding Judge Richard W. Walker, afterwards presiding judge of the Fifth Circuit Court of Appeals, said:

> "The words 'the lands of another' are comprehensive enough to include lands possessed or occupied by one who is not the holder of the fee, and the word 'owner' is not infrequently used to describe one who has dominion or control over a thing, the title to which is in another. Johnson *v.* State, 1 Ala. App. 148, 55 South. 268; 6 Words & Phrases, p. 5148. In view of the manifest purpose of the statute to limit the hunting privilege to authorized persons, we are of opinion that the provision in question is not to be so narrowly construed as to exclude from its protection the possessor or occupant of land having actual dominion over it, though the title is in another, or in others jointly or in common with him."

The case referred to by Judge Walker of 1 Ala. App. 148, supra, was decided by him, and in that case the indictment charged that the defendant set fire to or burned a barn of Josh Crim. Judge Walker, after observing that the indictment must aver the *ownership of the building burned*, said, "But the ownership to be proved relates to the actual occupancy, the dominion in fact over the thing, not to the nature of the estate or claim of the occupant. It is the possession, not the tenure or interest in the property, which should be described." The proof in that case showed that Crim had title to the property, but Cass Harrison, his ten-

ant, was in possession of it. The Court held that there was a fatal variance between the allegations and proof as to ownership.

In the case of *Melvin* v. *Scowley*, 213 Ala. 414, the Alabama Supreme Court, speaking through Justice Thomas, said:

> "The word 'own' is synonymous with 'possess', and the effect of defendant's testimony was that he possessed—was in possession of—the property mentioned. 'There is no substantial difference between the meaning of the words "possess" and "own". They are equivalent in common speech, and according to all the lexicographers.' Thomas *v.* Blair, 111 La. 683, 35 So. 813."

In the case of *Scandinavia Belting Co.* v. *Asbestos Co.*, 257 Fed. 937, 954, the Circuit Court of Appeals of the Second Circuit, certiorari denied by the Supreme Court, 250 U. S. 644, 63 L. Ed. 1186, in construing the meaning of the word "owner" as used in a statute, said:

> "It is an established rule governing the construction of statutes that they are to have a rational and sensible interpretation. The object which the legislative body sought to obtain and the evil which it endeavored to remedy may always be considered to ascertain its intention and to interpret its acts."

> "As applied to personal property, the term 'owner' includes the persons to whom a chattel belongs; the person who has the possession and control of a chattel; the person in possession and control of any article of personalty; * * * a bailee * * *. The person in control of a vehicle either mediately or immediately and not the literal and technical owner."

> 50 Corpus Juris 776.

> "A bailee has by virtue of the bailment and until its termination, a special property or possessory inter-

> est in the subject matter, which is equivalent to, or in the nature of, actual ownership except as against his bailor, and entitles him, whatever may be the class of bailment, to avail himself of any legal means to defend it."
>
> 8 Corpus Juris (Secundum), page 252.
> See also 30 Words & Phrases (Permanent Edition) page 659.

We conclude that either phrase of the Alabama Statute was broad enough to authorize service on the petitioner.

Was the petitioner corporation immune from service in Alabama because it had never qualified to do business in Alabama?

Petitioner contends first that under Section 232 of the Constitution of Alabama, a corporation which has not qualified to do business in this State is not subject to suit. The Supreme Court of Alabama has more than once expressly ruled to the contrary.

In *St. Mary's Oil Engine Co.* v. *Jackson Ice & Fuel Co.*, 224 Ala., 152, 155; 138 Sou. 834, service of process was had on a foreign corporation which had done business in the State, but had never qualified. The Court held that Section 232 of the State Constitution had no application, saying in pertinent part:

> "It appears without dispute that the defendant is a foreign corporation, and that it has not qualified to do business in Alabama; therefore the provisions of Section 232 of the Constitution requiring foreign corporations to qualify by establishing a place of business in this state and the designation of an agent upon whom process may be served, as a prerequisite to engaging in business in this state, and the statute enacted in pursuance thereof, in so far as they provide a mode of service on foreign corporations, are confined to corporations that have qualified thereunder, and are foreign to the question in this case."

In *Parker* v. *Central of Georgia Railway Co.*, 233 Alabama, 149, 170 Sou. 333, an action under the Federal Employer's Liability Act, was held maintainable in the State of Alabama, notwithstanding that the railroad company was not engaged in transacting business in the State at the time the suit was instituted. The Court said in part:

> "We have not held, nor has any other court so far as we know, that if there is effectual personal service on a foreign corporation in Alabama, the court was without power to render a judgment because defendant was a foreign corporation not doing business in Alabama, if the cause of action arose in Alabama."

Presumably the Legislature of Alabama complied with the State Constitution in enacting Alabama Code 1940, Title 7, Sec. 193 and Sec. 199, both set out in the appendix to this brief, and yet if petitioner's contention is correct, then Sec. 193 is void and Sec. 199 cannot apply to a nonresident corporation.

Petitioner next contends that service of process upon it in Alabama when at the time of such service it was not carrying on business there, would be in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. That contention, we respectfully submit, has been conclusively answered by this Court in the following cases:

In *Washington Ex Rel. Bond & Goodwin & Tucker, Inc.* v. *Superior Court*, 289 U. S. 361, 364; 77 L. ed. 1256, 1259, this Court said:

> "The State need not have admitted the corporation to do business within its borders * * * Admission might be conditioned upon the requirement of substituted service upon a person to be designated either by the corporation, * * * or might, as here, be upon the terms that if the corporation had failed to appoint or maintain an agent service should be made upon a

state officer, * * *. The provision that the liability thus to be served should continue after the withdrawal from the State afforded a lawful and constitutional protection of persons who had there transacted business with the appellant. * * *

"It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the State constitutes an assent on its part to all the reasonable conditions imposed."

In *Hess* v. *Pawloski*, 274 U. S. 352, 356, this court held that the statute of the State of Massachusetts in all respects similar to the Alabama statute here involved, was constitutionally valid and did not amount to the denial of due process of law under the Fourteenth Amendment of the Federal Constitution. In part the Court said:

"The state's power to regulate the use of its highways extends to their use by nonresidents as well as by residents. * * * And, in advance of the operation of a motor vehicle on its highway by a nonresident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. Kane *v.* New Jersey, 242 U. S., 160, 167, 61 L. ed. 222, 226, 37 Sup. Ct. Rep. 30. That case recognises power of the State to exclude a nonresident until the formal appointment is made. And, having the power so to exclude, the state may declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served. * * * The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the 14th Amendment."

A similar statute of the State of New Jersey was upheld in *Wuchter* v. *Pizzutti*, 276 U. S. 13, 72 L. ed. 446.

In *Doherty & Co.* v. *Goodman*, 294 U. S. 623, 628, 79 L. ed. 1097-1100, in upholding a State statute permitting service of process on any agent or clerk employed in the office or

agency maintained in the State by nonresident corporations in all actions growing out of or connected with the business of that office or agency, this Court said in part:

> "The power of the states to impose terms upon nonresidents, as to activities within their borders, recently has been much discussed. Hess *v.* Pawloski, 274 U. S. 352, 71 L. ed. 1091, 47 S. Ct. 632; Wuchter *v.* Pizutti, 276 U. S. 276 13, 72 L. ed. 446, 48 S. Ct. 259, 57 A. L. R. 1230; Young *vs.* Masci, 289 U. S. 253, 77 L. ed. 1158, 53 S. Ct. 599, 88 A. L. R. 170. Under these opinions it is established doctrine that a state may rightly direct that nonresidents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to accept service of process, provided there is some 'provision making it reasonably probable that notice of the service on the Secretary will be communicated to the nonresident defendant who is sued'."

Petitioner's Claim of Privilege or Immunity.

The Circuit Court of Appeals disposed of this contention in one paragraph.

> "The argument that the defendants were engaged in work in aid of winning the war, and, therefore, immune from penalty or process, finds its support only in the patriotic impulses of the human heart but not in statute or precedent. Even a soldier, be he ever so vital to the Army, is not immune from either civil or criminal process."

Authorities are not needed to support the lower Court's opinion, but out of abundance of caution, we cite the following:

Bates v. *Clark*, 95 U. S. 204, 5 C. J. p. 364, Sec. 218, p. 366, Sec. 221;

Neu v. *McCarthy-Mass.* 33 N. E. (2) 570, 133 A. L. R. 1293.

In short, petitioner says that because this country is at war with Germany and Japan respondents suing for the death of their intestates have no causes of action against the petitioner.

Petitioner's contention is that because this country was at war so far as it was concerned Section 123, Title 7 of the Alabama Code was repealed. Let us ask the question, "What has petitioner done that has made it immune from the laws of Alabama and placed it upon a pedestal armed with a license to wrongfully take the lives of two of our citizens and go unwhipped of justice?" Petitioner answer the question by saying that at the time it committed these wrongs it was transporting a truck belonging to the Government that was to be used in the prosecution of the war.

Now let us ask another question, "Why and how did petitioner transport this truck?" For an answer to this question we will not go to petitioner's brief, but will go to the record filed in these causes.

Petitioner was incorporated in the State of Illinois long before the war began. Its business was that of transporting auto vehicles from factory to dealers. Its business was legitimate and was, we may assume without fear of contradiction, carried on for profit and not pro bono publico. In determining the pay it was to receive for transporting these vehicles in order to make this profit many things had to be taken into consideration. One of these things was based on the saying, "It is human to err." It knew that in operating these trucks upon the public highways of this Union the great probabilities were that it would from time to time become liable for damages under the laws of the different states of the Union for the wrongs, errors or mistakes of its servants or employees while operating the vehicles in these States. It knew that it would have to stand these losses by being its own insurer or it would have to pay premiums to

liability insurance companies to protect it from them. It is but natural to assume that these items of insurance premiums, or the probable losses that it would sustain if it was its own insurer, were added to the other items of expense incident to carrying on the business, and were finally paid for by its customers for whom it transported the vehicles. "Good business for profit" required this to be done. The war came on and it is common knowledge that the business of transporting auto vehicles from factory to dealers was greatly reduced if not paralyzed. The next thing we know petitioner's General Manager is in Washington, and we may ask the question here that the Judge in the District Court asked petitioner's attorney: "Did they go there though as a private corporation to get business from the Government just as contractors? Washington is full of people seeking business" (R. 102). Petitioner's General Manager, not a Government official, phoned to Reis from Washington and ordered him to go immediately to Atlanta and open a branch office there. Reis did this and thereafter as a common carrier for reward petitioner transported trucks for the Government. These transactions were evidenced by standard bills of lading issued by petitioner and followed by bills of lading issued by the Government after the deliveries of the trucks. These bills of lading showed the relationship that existed betwen petitioner and the Government. That relationship was that of carrier and shipper, nothing more and nothing less.

But what about the pay or compensation that petitioner received from our Government? What discounts or sacrifices did petitioner make to aid the Government in the prosecution of this war that should give it immunity from our laws? We will let this question be answered by petitioner's Branch Manager Reis, who said, "*The Government paid us the same as any other shipper paid us for*

hauling freight" (R. 113). Doubtless these payments included the item of expense hereinbefore referred to at some length.

The Government had nothing in the wide world to do with the selection of the Company's officials, nor its agents, servants or employees who would operate the trucks. Petitioner itself routed the trucks as shown by its bills of lading. Reis said that the only thing the Government required the Company to do after delivery of the trucks to the Company was to keep them greased and not run them faster than thirty-five miles an hour, the things that every purchaser of a new auto vehicle is cautioned to do for the first one thousand miles of travel.

Petitioner, so far as the United States Government was concerned, was nothing more and nothing less than an independent contractor voluntarily contracting with the Government at arms length with the end in view of making profit. The learned and just Judge of the District Court correctly sized up the situation during the trial of the cases in his remarks to petitioner's counsel. He said:

> "Looks to me like the force of your argument would be that every Government contractor in the United States would be absolutely immune from any kind of negligence on his part, or the part of his employees."
>
> * * * * * * *
>
> "My view of the law is that means nothing more or less than if they had been on the Southern Railroad Company or the L. & N. Railroad Company or any other kind of carrier. The same kind of bill of lading."
>
> "Your argument is that if they are hauling anything pertaining to the war, they could be absolutely reckless of everybody else's rights?"

There is not a thing in the entire record that tends to show that the Government had taken over the operation of petitioner's business or directed its operations in any

way. If such a condition had existed it was easily within the power of petitioner to show and prove it, and this it failed to do, doubtless for the reason that it could not. The only thing in the world that the Government did was what every other shipper of goods does, and that was to deliver the trucks to the carrier with instructions or directions as to where to carry them, and the carrier charged the Government for its services the same as it charged any other shipper. If this be true, and it certainly is if we are guided by the evidence found in the record and not by the conclusions found in petitioner's brief, then petitioner says, as we understand its brief, that it would be immune from the influence of the statute upon which the two death cases rest, and that this statute has been repealed in Alabama so far as petitioner is concerned.

Petitioner puts to task and condemns the Sheriff of Lowndes County for arresting Clark and putting him in jail. What this has to do with these cases we are unable to grasp. In passing, however, we ask, what should the Sheriff have done when arriving upon the scene of the tragedy he beheld two dying persons, an unconscious person, a demolished wagon and two dying mules, and heard the person who caused it all say that he was awake, and the cause of it all was a mule shied and threw the wagon in front of his truck; and then the Sheriff saw that the physical facts said to this person, "You are lying"? Would the answer be, put him in jail, where he belongs, as the Sheriff did, or pat him on the back and tell him to go on, as petitioner says he should have done?

Now to guard against such an emergency, if petitioner was so concerned in having the trucks delivered with great speed and without delay, why did it not have an additional person to go along on this journey with this convoy of five trucks to take the place of one of the drivers who might for any reason become disabled to continue to

drive? The answer to the question must be, petitioner's profits would have been reduced.

It is a fact known to all, and we may say judicially known to this Court, that many independent contractors who have dealt with the Government in the prosecution of the war have made enormous and unconscionable profits. Should these creatures, independent contractors who operate for profit and give to the Government nothing more than they give to everyone else, be made immune from our laws because our Government is at war? The question answers itself.

What has been said hereinbefore needs no authorities or precedents to support its soundness. Petitioner, however, *in spite of the record*, contends that it was a Government agency and says "that it would be liable for its wrongs inflicted on third persons in times of peace but not in times of war. The law is that a Government official is liable for its wrongs, war or no war, unless expressly exempted from such liability by some law.

Philadelphia Company v. *Stimson, Secy. of War*, 223 U. S. 605, 619, 56 L. Ed. 570;

Goltra v. *Weeks*, 271 U. S. 536, 544, 70 L. Ed. 1074, 1079.

Hopkins v. *Clemson Agricultural College*, 221 U. S. 636, 643, 55 L. Ed. 890, 894.

Missouri Pacific R. R. Co. v. *Ault*, 256 U. S. 553, 563, 65 L. Ed. 1087, 1092.

Belknap v. *Schild*, 161 U. S. 10.

Petitioner in its biref refers to and quotes from quite a number of cases. The principles announced in those cases are foreign to the principles involved in these cases, and we will not follow petitioner very far on this "sidetrack" other than to observe as follows:

Petitioner refers to the case of *Tennessee* v. *Davis*, 100 U. S. 257, and to the case of *Cunningham* v. *Neagle*, 135 U. S. 1, involving Justice Field, and concludes that in those two cases the State laws were abrogated and held for naught because the cases could be tried in the Federal Court. With the same reasoning every case removable to the Federal Courts from the State Courts would result in the abrogation of the State laws. In the two cases referred to by petitioner the defendants were officers of the United States Government. One was a Revenue Officer, the other a Deputy United States Marshal. They were charged with violation of the laws of the State. The Federal Statutes authorized the removal of the cases to the Federal Court if the acts were committed while the officer was in the discharge of his duties, the same as the Federal statute authorizes the removal from the State Courts to the Federal Courts of cases against nonresidents if the amount in controversy exceeds $3,000.00, by which authority this case was removed from the State Court to the Federal Court. Upon the trial of the cases in the Federal Courts the State statutes or laws are not abrogated or repealed, but the cases are tried in accord with those State statutes or laws unless they violate the Federal Constitution or some law passed by Congress that was authorized by the Federal Constitution.

Petitioner refers in its petition to some Alabama cases, *Howard* v. *Davis*, 209 Ala. 113 and *Heidtmuller* v. *L. & N. R. R. Co.*, 210 Ala. 538, that held that the Director General of Railroads during the last war was not subject to suit for the wrongful death of a third person, but petitioner failed to state why. The reason given by the Court was that the Government had taken charge of the operation of the railroads under a law which expressly provided that suits could not be brought against the Government for such penalties. See *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, 563, 65 L. Ed. 1087, 1092.

It follows from the foregoing that both reason and precedent say that Section 123, Title 7 of the Alabama Code, has not been repealed so far as petitioner is concerned and it must respond in damages for the wrongs done by it in causing the death of two human beings.

We respectfully submit that the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Alabama Constitution 1901, Article XII, Section 232:

"No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein and without filing with the secretary of state a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State. Strictly benevolent, educational or religious corporations shall not be required to pay such a tax."

Alabama Code 1940, Title 7:

Section 123: *Action for wrongful act, omission, or negligence causing death.*—A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate.

Section 193: *Service of process on corporation not qualified to do business in the state.*—Wherever a foreign corpo-

ration has carried on or transacted business in this state without qualifying to do business herein as is provided by the constitution and statutes of this state, and there is no agent, and process in actions at law cannot be served on such foreign corporation as is provided in the preceding section, then any legal process may be served upon any agent or servant of such foreign corporation who has made contracts for the corporation, or who did the act which constituted the doing of business in this state. This section, however, shall not be exclusive of any other mode of service of process in the cases herein provided for.

Section 199: *Service on non-resident operator or owners of motor vehicles.*—The operation by a nonresident of a motor vehicle on a public highway in this state, or the operation on a public highway in this state of a motor vehicle owned by any nonresident and being operate- by such nonresident, or his, their or its agent, shall be deemed equivalent to an appointment by such nonresident of the secretary of state of the State of Alabama, or his successor in office, to be such nonresident's true and lawful agent or attorney upon whom may be served the summons and complaint in any action against such nonresident growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such public highway; or in which such motor vehicle may be involved while being operated on such public highway within the State of Alabama; and such operation shall be deemed a signification of such nonresident's agreement and equivalent to an appointment by such nonresident of the secretary of state of the State of Alabama, or his success-- in office, to be such nonresident's true and lawful agent or attorney upon whom may be served all lawful process in any action or proceedings against such nonresident growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such public highway, or in which such motor vehicle may be involved while being operated on any such public highway in the State of Alabama, so that any such summons and complaint against such nonresident which is so served shall be of the same legal force and effect as if personally served

within the State of Alabama. Service of such process shall be made by leaving three copies of the summons and complaint, with a fee of three dollars, with the secretary of state of the State of Alabama, and such service shall be sufficient service upon such nonresident defendant; provided, that notice of such service and a copy of the summons and complaint are forthwith sent by registered mail to the defendant by the secretary of state of the State of Alabama, or his successor in office and the defendant's return receipt and the certificate of the secretary of state, or his successor in office, of the compliance herewith, which shall be filed in the office of the clerk of the court or in the court wherein said action may be pending. Such certificate of the secretary of state shall show the date of the mailing by registered mail of the notice of the service and copy of summons and complaint to such nonresident defendant, and the date of the receipt of the return card, and shall be signed by the secretary of state of the State of Alabama, or his successor in office; or, provided, that the secretary of state of the State of Alabama, or his successor in office, may give such nonresident defendant notice of such service upon the secretary of state of the State of Alabama in lieu of the notice of service hereinabove provided to be given, by registered mail, in the following manner: By causing or having a notice of such service and a copy of the summons and complaint served upon such nonresident defendant, if found within the State of Alabama, by any officer duly qualified to serve legal process within the State of Alabama, or if such nonresident defendant is found without the State of Alabama, by a sheriff, deputy sheriff, or United States Marshal or deputy marshal, or any duly constituted public officer qualified to serve like process in the state of the jurisdiction where such nonresident defendant is found; and the officer's return showing such service, when made, shall be filed in the office of the clerk of the court, or in the court wherein such action is pending, on or before the return day of the process, or within such further time as the court may allow; provided further that the secretary of state, or his successor in office, may require the plaintiff in such action to deposit two dollars addi-

tional with the secretary of state of the State of Alabama to cover costs and such officer's fee for serving such notice and process. And the court in which such action is pending may order such continuance or continuances as may be necessary to afford such nonresident defendant reasonable opportunity to defend the action. The fee of three dollars paid by the plaintiff to the secretary of state, required to be deposited with the secretary of state at the time of service, and the additional fee of two dollars if it is required to be deposited by the plaintiff with the secretary of state, shall be taxed as costs, if he prevails in the suit. The secretary of state shall keep on file in his office a copy of such summons and complaint and also keep a record of all such process which shall show the day and hour and manner of such service.

This section shall not apply to any foreign corporation that has qualified under the constitution and laws of this state as to doing business herein, and has designated and has and is maintaining at such time an authorized agent or agents residing in this state upon whom service can be had.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 776

DEALER'S TRANSPORT COMPANY,
Petitioner,

vs.

ESSIE MAE REESE, AS ADMINISTRATRIX OF THE ESTATE OF ISAAC REESE, DECEASED, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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Counsel for Petitioner.

CLAUDE E. HAMILTON, JR.,
POWELL & HAMILTON,
Of Counsel.

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BRIEF AND ARGUMENT.

Briefly stated petitioner contends:

1. Constructive service under Section 199, Title 7 of the Alabama Code can be had only:

(a) Where the motor vehicle is actually operated by a non-resident.

(b) Where the motor vehicle is *owned* by non-resident and is actually being *operated* by such *non-resident owner*, or his, their or its agent.

Operation.

The only term used in the Alabama Statute authorizing constructive service on the Secretary of State is the word "operation." The only provision authorizing such service refers to the *operation* of the motor vehicle, in the first instance by a non-resident of the State and in the second instance *operation* by the *non-resident owner* or by the *agent* of the *non-resident owner*.

In either case, the word "operation" in every reported case is construed to mean *a personal act* in working the mechanism of the car. The first sub-division of the act relates to the operation of the motor vehicle by the non-resident himself.

In the instant case, Clark was the non-resident operating the vehicle. He was personally working the mechanism of the car.

Petitioner could not be brought into Court by service on the Secretary of State under the first sub-division of the act because Clark and not petitioner was personally operating the car. He was working it mechanism.

Flynn v. *Kramer*, 271 Michigan 500, 261 N. W. 77.

Ownership.

Under the second sub-division of the act, the car had to be operated by the owner, or the owner's agent. Clark was the person actually operating the motor vehicle at the time of the accident. He was the employee of petitioner, but petitioner was not the *owner* of the car. Under this sub-division, constructive service could not be had unless the non-resident *owner* was actually operating the car, that is, working its mechanism, or unless Clark, who actually operated the car, was the agent of the *non-resident owner*. If petitioner was not the non-resident *owner* of the car, service upon the Secretary of State as its agent was void because

such service could be had only in those cases where the non-resident was *owner* of the vehicle and was operating it either in person or by agent.

The undisputed evidence shows that the United States was the *owner* of the motor vehicle and it was so held in the opinion rendered by the Circuit Court of Appeals.

The Alabama Statute is in derogation of the common law and must be strictly construed. Such statutes can not be extended by implication to non-residents not coming within their terms.

> See *Jermaine* v. *Graf* (1939) 225 Iowa 1063, 283 N. W. 428 and other authorities cited on page 27 of brief and argument in support of petition for certiorari.

In their opinion, the Circuit Court of Appeals hold in effect that petitioner was the principal and Clark was its agent in the operation of the motor truck, that this being true the question of ownership was not involved. By their decision they read into the act a provision to the effect that the operation by the agent of a non-resident principal authorizes constructive service upon the Secretary of State, although such principal was not the *owner* of the motor vehicle involved in the accident.

Counsel for respondents attempt no defense of the opinion. By their silence they tacitly admit the grounds upon which the opinion is based are wrong. Instead of defending the opinion they are urging affirmance on the very grounds rejected by the Court of Appeals in their opinion, viz:—That Petitioner, Dealer's Transport Company, and not the United States, was *owner* of the motor vehicle involved in the accident.

They in effect admit that, unless Petitioner was owner of the motor vehicle driven by Clark at the time of the accident, service on the Secretary of State was void.

Ignoring the fact that the statute is in derogation of the common law and must be strictly construed, they give to the word "owner" the broadest of definitions and place upon it a construction clearly in conflict with the plain meaning of the statute. The question is not the meaning that may be given to the word "owner" under varying circumstances and conditions, but what is its meaning as used in the act.

Evidently one purpose of the Act was to reach by constructive service the non-resident owner of the vehicle, where it was operated by his or its agent in the State, it being a matter of common knowledge that many such non-resident owners were solvent and could be made to respond in damages, whereas the operating agent might be insolvent. Thus construed the legislature meant the real owner.

In *Caminetti* v. *U. S.*, 242 U. S. 485-6, the Supreme Court tersely announces the following rule of construction of words:

> "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense and with the meaning commonly attributed to them."

There is nothing in the constructive service statute suggesting that the word "owner" is to be used in any other manner than in its ordinary and usual sense.

Webster's New International Dictionary defines the word "owner" as follows:

> "One who owns, a proprietor, one who has the legal or rightful title, whether the possessor or not."

50 C. J., Sec. 53, page 779, defines "ownership" as follows:

> "'Ownership' differs from 'operation, maintenance or possession', in that ownership is continuous, while operate, maintenance or possession may be temporary."

Under this sensible definition, ownership of the truck was unquestionably in the United States. This would be true even through the provisions of the act as to ownership were not surplusage as held by that court.

Following the doctrine of strict construction, the United States' ownership of the truck was continuous, while that of Dealer's Transport Company was merely one of temporary possession and operation. The statute does not contemplate two ownerships. It plainly means a continuous ownership as distinguished from temporary possession and operation.

There is nothing in the testimony to in the least sustain the contention that by accepting the truck, the Dealer's Transport Company became its owner. Instead it became bailee of the property without any change of *ownership or title.*

A contract with a common carrier "for the carriage of property is a form or specie of bailment and the law of carriers, *in so far as the transportation of property is concerned,* is a development and extension of this phase of the law of bailment." (Emphasis supplied) 9 Am. Juris. 429.

> "Where one with the legal title to property becomes the bailor thereof, the contract of bailment does not contemplate *any change in such title and it remains in the bailor.*" (Emphasis supplied) 6 Am. Jur. 211.

The United States had title to the truck. It was delivered to Dealer's Transport Company for transportation. Thereby the United States became the bailor and the Dealer's Transport Company became the bailee. The title still remained in the United States, the bailor, and it was still the owner of the truck.

Under the facts shown by the record, respondents' contention that Dealer's Transport Company became the owner of the truck when it was received for transportation and

at the time the accident occurred, cannot be sustained without interpolating into the act what is known as a fiction of law. If this is done the plain and ordinary meaning of the word "owner" will be changed without anything in the act indicating such legislative purpose. It can not be done without reading into the act a provision that would destroy its plain meaning as to the real owner and substituting therefor a special meaning that the wording of the statute does not justify.

No wonder the Circuit Court of Appeals avoided basing their opinion upon the question of ownership. To sustain their contention Counsel assert that the words "possession" and "ownership" are interchangable and that one who has possession of property is its owner. If this be true, the truck had four owners instead of one:—

(1) The United States; (2) The agent of the government delivering the truck to Clark for transportation; (3) Dealer's Transport Company; (4) Clark, the driver. Successively each had possession.

Following its delivery Clark was the owner of the truck at the time of the accident. He alone was in the actual possession of it. He was both owner and operator.

The Court can readily see the absurdities to which the argument leads.

There is nothing in the evidence showing the United States in any way relinquished its ownership to its agents. The truck was delivered to the agent of Dealer's Transport Company, under agreement with the *owner* that it would be delivered for the *owner* under the government bill of lading to the government's agent at the Air Base in New Orleans.

It is conceded that this made the government bailor and Dealer's Transport Company, bailee of the truck. The legal title was in the bailor and the contract of bailment did

not contemplate any change in the title but it remained in the bailor. 6 Am. Jur. 211.

The question is not how many varied meanings may be given, but what was the real meaning intended of the word "owner" by the legislature.

Had the truck in question been owned by the Chevrolet Company, a non-resident, and it had employed Dealer's Transport Company to deliver it to a customer in New Orleans, and that Company had entrusted its delivery to its employee, Clark, what would have been the status of the parties had the accident occurred as detailed by the evidence in this case? In bringing suit, would counsel for respondents have eliminated the Chevrolet Company and sued Dealer's Transport Company and Clark and had Dealer's Transport Company made a party as owner by service upon the Secretary of State, or would they have also sued Chevrolet Motor Company and brought it into court by service of process upon the Secretary of State averring that it was the owner of the truck? There can be but one candid answer to this question. Certainly under those facts, the Dealer's Transport Company would not be the owner of the truck, but both it and Clark would have been agent and sub-agent of the Chevrolet Company. If in such case suit were desired against Dealer's Transport Company, service would not have been had on the Secretary of State, because it was not owner of the truck. The Chevrolet Company would have been the owner and bailor and Dealer's Transport Company and Clark would have been the bailees, and agents.

> "If the nature of the business is such that it must be contemplated by the principal that the authority conferred on the agent will be exercised through subagents, a power in the agent to delegate that authority will be implied. 2 Am. Jur. Sec. 197, page 156.

Being a corporation, the actual delivery of the trucks had to be entrusted to an agent. The delegation of Clark to deliver the trucks made him not only an agent of Dealer's Transport Company but also of the Government. A subagent, as well as an agent, bears a fiduciary relationship to the principal. 2 Am. Jur. Sec. 202, page 161.

In support of their contention, counsel cites the cases of *Lockhart* v. *The State*, 6 Ala. App. 62 and *Melvin* v. *Scowley*, 213 Ala. 414. These cases are not in conflict with petitioner's contention on the question of ownership. These cases merely hold that in certain instances the word "own" may be construed to mean possess where the possession instead of ownership is the main point in issue.

Counsel cite *Scandinavia Belting Company* v. *Asbestos & Rubber Works*, 257 F. 954, in support of their contention.

We do not disagree with them as to the established rule there announced governing the construction of statutes to the effect that they are to have a rational and sensible interpretation. In the same case, page 955, the Court gives the following definition of ownership:

> "Ownership is the right by which a thing belongs to one in particular to the exclusion of all others."

The ownership of the truck belonged to the United States to the exclusion of all others.

It is true that a bailee in possession of property may avail himself of any legal means to defend it as against all persons other than the bailor or owner. But this is in subordination to the rights of the owner or bailor. It does not destroy the ownership of the real owner. Certainly the statute did not have reference to the bailee of the real owner of the property, the United States in the instant case, and could not have mean that the bailee was the owner of the motor vehicle, who could be brought into court by constructive service on the Secretary of State.

Certainly the word "possess" or "possessor" can not be held to be synonymous with the word "owner" as used in the statute under discussion. As applied to the statute they are not interchangeable. The words of the second division of the Act are as follows:

> "* * * or the operation on a public highway in this State of a motor vehicle owned by any non-resident and being operated by such non-resident," etc.

If the word "possess" can be used interchangeably and mean the same as the word "owner", then that part of the Act as above quoted could read as follows:

> "* * * or the operation on a public highway in this State of a motor vehicle possessed by any non-resident and being operated by such non-resident, or agent," etc.

By contrasting them the Court will readily see that the two words do not mean the same thing. If the word "possess" had been used instead of "owned", in the statute, it would have been of much wider signification, because as used in that sense anyone possessed of the automobile, regardless of ownership or title, would be subject to substituted service.

On the other hand, if "possess" and "owned" mean one and the same thing, then the defendant, James Olan Clark, was the owner of the truck because at the time of the accident he possessed it.

The effort of counsel to show that the words "possession" and "ownership" mean the same thing and that the possessor of personal property is its owner suggests the story of the farmer's son, who went to college and studied logic. On his return home he informed his father that by the rules of logic he could prove that a magpie was a pigeon. His process of reasoning was: Magpie and jackpie were the feminine and masculine of that bird and therefore the same,

that a magpie was a jackpie, a jackpie was a johnpie and a johnpie was a piejohn (pigeon). Duly impressed by his powers of logic the father suggested that they go down to the lot and he would give him a chestnut horse. Proceeding to a chestnut tree in the lot the father picked up a horse chestnut and presented it to his son. Very much disappointed the boy insisted that his father had promised him a chestnut horse. His father replied that he had complied with his promise because by the rules of logic a horse chestnut was a chestnut horse.

And so by the irresistible rules of logic, Dealer's Transport Company by its constructive possession became the owner of the truck belonging to the United tSates. Likewise Clark on going into the actual possession of the truck became and was its owner at the time of the accident.

The Court can readily see where such arguments may lead and what unsound conclusions may be reached if they are upheld.

Certainly under the first division of the Code Section, substituted service could not be had. The same is equally true of the second division of the Act, because it plainly provides that substituted service may be had against the owner, not the possessor of the vehicle, who operates it in person or by its or their agents without extending the provision to any other persons than those named in the Act.

The statute construed in *Jones* v. *Pebler*, 371 Ill. 309, 125 A. L. R., 451, and cited by counsel for respondents, differs in several respects from the Alabama statute, although counsel insist that the provisions are similar. The statute construed in that case provides that the mere *use* or *operation* by a non-resident of a motor vehicle on a highway in the State of Illinois serves automatically to appoint the Secretary of State as an attorney to receive service of process, and the "use" or "operation" the law ordains, shall be a significance that such substituted service shall be of the

same legal force and validity as personal service. 125 A. L. R., 455.

In construing the statute the Court held that the word "non-resident" as used in the statute included every non-resident, individual or corporation, owner or *non-resident owner* using and operating a motor vehicle over Illinois highways. 125 A. L. R., 455.

As held by the Illinois Court, the statute of that state differed materially from the New York statute followed in many respects by the Alabama statute. As to this the Illinois court said:

> "Moreover a comparison of the Illinois statute with the New York statute construed in the O'Tier case disclosed important points of dissimilarity. While the New York statute made only the "operation" by a non-resident of a motor vehicle on a public highway of the State, basis of constructive service, the Illinois statute employs the more comprehensive expression '*use and operation*'." (Emphasis supplied.)

The Illinois Court also referred to the case of *Brown* v. *Cleveland Tractor Company*, 265 Michigan 475, 251 NW. 557, based on an act of the Michigan Legislature, stating that it was practically identical with the New York statute. In the case of *Brown* v. *Cleveland Tractor Company*, it was held that the Michigan Court restricted the application of the statute to non-residents who *personally* drove their automobiles. Referring to this the Illinois Court stated that the New York and Michigan statutes construed in *O'Tier* v. *Sell* and *Brown* v. *Cleveland Tractor Company* as applying only to the operation by non-residents of motor vehicles on public highways in those states had both since been amended by adding the words:

> * * * "or the operation on a public highway in this state of a motor vehicle—owned by a non-resident if so operated with his consent, express or implied."

In the opinion the Court also said:

> "Neither statute incorporated the word '*use*' which is employed three times in the Illinois law. On the other hand the word 'owner' does not appear in our statute." 125 A. L. R. 456.

It will thus be seen that the Illinois statute construed in *Jones* v. *Pebler* was quite different from the New York and Michigan statutes and that the Alabama statute is substantially the same as the Michigan and New York statutes before they were later amended in that the word "operation" alone is used and the word "use" nowhere appears in the Alabama Act.

The Court held that because the Illinois statute employed the more comprehensive expression "use and operation", this was sufficient to authorize constructive service as to the non-resident who permitted an agent to *use* and operate the motor vehicle in the State of Illinois. It follows that *Jones* v. *Pebler* is not opposed to, but sustains Petitioner's contentions.

Dealer's Transport Company Was a Foreign Corporation, Not Doing Business in Alabama at the Time Constructive Service Was Had on the Secretary of State. Therefore Such Service Was Void.

It is conceded that petitioner was not engaged in business in Alabama at the time service was had on the Secretary of State.

The only business petitioner had was in Atlanta. It had not transported or delivered through Alabama any vehicle except for military purposes for the United States—nothing but military trucks out of Atlanta. They had no civilian business in Atlanta. It was military (Reis' testimony R. 36).

Coming to Atlanta was under the instructions of the government for the express purpose of delivering motor trucks

for military purposes. Petitioner did not engage in or endeavor to engage in any other business except that (Reis' testimony R. 112-13).

To render a foreign corporation subject to the jurisdiction of State courts, it must be engaged in business in the State at the time process is served. This is sustained by an unbroken line of Federal and State decisions.

As the principle is so well settled, we deem it necessary to quote only a few excerpts from some of these decisions bearing directly on the point:

> "In order to hold a foreign corporation, not licensed to do business in a State, responsible under the process of a local court, the record must disclose that it was carrying on business there at the *time of the attempted service.*" (Emphasis supplied)
>
> *Consolidated Textile Corporation* v. *Gregory*, 289 U. S. 85, 77 L. Ed. 1047.

At the time of the service petitioner was not licensed to do business in Alabama, had not complied with the requirements of Section 232 of the State Constitution to do business and was not engaged in business in the State.

> "It will be observed that the validity of the service upon an agent of a foreign corporation within the state depends upon whether the corporation was (1) doing business by an agent in the exercise of *its corporate function;* (2) at the *time* suit was perfected by the service made; and it is not to be tested by the *time* the process issued, or was delivered to the Sheriff, but *at the time he served* that process the corporation was doing business, an essential to service of process in the case." (Emphasis supplied)
>
> *Ford Motor Company* v. *Hall Auto Company*, 226 Ala. 385, 388, 147 So. 603, 606.

The above decision clearly holds that the corporation must be doing business by an agent in the exercise of its

corporate functions. Certainly Dealer's Transport Company was not doing business by the Secretary of State as its agent in the exercise of its corporate functions at the *time* service of process was made.

> "* * * the corporation must be doing business in the State when the process was served by the Sheriff, not only when it was delivered to the Sheriff."
>
> *Davis* v. *Jones*, 236 Ala. 684, 687, 184 So. 896, 899.

> "The main question for decision is whether, *at the time of the service of process*, defendant was doing business within the State in such manner and to such an extent as to warrant the inference that it was present there." (Emphasis supplied)
>
> *Cannon Manufacturing Company* v. *Cudahy Pkg. Co.*, 267 U. S. 333, 334-5; 69 L. Ed. 634, 641.

> "The sole question for decision is whether, *at the time of the service of the process*, defendant was doing business within the district in such manner as to warrant the inference that it was present there. (Emphasis supplied)
>
> *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171, 172; 67 L. Ed. 594, 595.

Section 192, Title 7, Code of Alabama 1940, formerly Section 9426, Alabama Code 1923, provides that where the foreign corporation has complied with Section 232 of the Alabama Constitution and the designated agent shall die, resign, remove from the State, or his authority shall cease and no other agent shall be designated by the corporation, service of process issued against it may be made upon the Secretary of State.

Construing this section the Alabama Supreme Court has held its provisions do not apply to cases where the foreign corporation *is not engaged in business in the State at the time of service on the Secretary of State.*

Referring to these provisions of the Code Sections, the Court in *Cowikee Mills* v. *Georgia-Alabama Power Company*, 216 Alabama, 222, 113 So. 4, in affirming the lower Court's ruling sustaining defendant's plea in abatement, said:

> "But these provisions must be viewed *in the light of the Fourteenth Amendment to the Constitution of the United States, known as the due process clause* of the Constitution as interpreted by the Federal Supreme Court. So viewed, we are of the opinion the language must be held applicable only to those foreign corporations *still engaged in business in this state, and subject to the jurisdiction of our court.*" (Emphasis supplied)

Authorities Cited for Respondents.

We desire to impress upon the Court that we are not attacking the constitutionality of the Alabama constructive Service Statute. Our contention is that, being in derogation of the common law, the statute must be strictly construed and can not be invoked except in the cases expressly authorized by its provisions.

Nor are we insisting that a foreign corporation is entirely immune from suit where it fails to comply with Section 232 of the Alabama Constitution as to engaging in business in the State. Even if it may not have complied with this section of the Constitution, it may still be subject to suit if in point of fact it is engaged in business, although not licensed in the state at the time suit it brought.

Examination of authorities cited by counsel for respondents as to this phase of the case will show that they are not in point.

Citation by counsel and their application of the principles of law announced in *St. Mary's Oil Engine Company* v. *Jackson Ice & Fuel Company*, 224 Alabama 152, 155; 138 So. 834, are misleading. It is true the Court in that case

correctly holds that a foreign corporation, although it has not complied with the provisions of Section 232 of the State Constitution, may be sued in the State Courts, but the decision goes farther and expressly holds that to authorize such suit, the foreign corporation must be doing business by agent in the State *at the time* the process is served. In the case referred to, service of process was upon defendant's office manager and bookkeeper, Hucke. Motion to quash was practically upon the same grounds as in the case at bar. The proof showed that at the *time of service* Hucke was the agent of defendant corporation, that he was in Alabama, on defendant's business and was transacting business for it *at the time suit* was brought and *served on him*. The Court held:

> "The evidence offered on the trial of the motion to quash the service was sufficient to support the conclusion that defendant's office manager and bookkeeper was sent into this state by the corporation to visit its customers, collect accounts, make sales, and to call upon the president of plaintiff corporation and settle and adjust the controversy out of which this litigation arises, and he was engaged in and about the duties of his agency *when served;* that this service on said Hucke was authorized by the statute, and this service in connection with the fact *that the defendant was doing business in Alabama* constituted due process of law. Therefore, we are of opinion that the motion was denied without error." (Emphasis supplied.) 224 Ala. 158.

The difference between the St. Mary's Oil Engine Company and the case at bar is that in the *St. Mary's Oil Engine Company* case, that company was doing business in the State of Alabama by agent and the agent was served at the time the company was engaged in business.

In the case at bar, Dealer's Transport Company was not engaged in business in Alabama at the time service

was had on the Secretary of State and had not been engaged in business prior to the service of process.

Counsel also cite *Parker* v. *Central of Georgia Railway Company*, 233 Ala. 149, 170 So. 333. This decision is not in point and again the citation is misleading.

The facts in the *Parker* case are entirely different from the case at bar. Prior to going into the hands of a receiver the Central of Georgia Railway Company had filed with the Secretary of State as required by Section 232 of the Constitution an instrument designating Montgomery as its known place of business and also designating an authorized agent residing there. It had not prior to the bringing of the suit filed any instrument abandoning or changing the place of business, or in any way amending the designation of its place of business and appointment of its agent.

The question of sufficiency of personal service was not even raised. As to this the Court, 233 Alabama 151, said:

> "We notice that appellee *does not raise* any question as to the sufficiency of the service to justify a personal judgment. Indeed, counsel in brief for appellee for the purpose of appeal concede that the service was effected." (Emphasis supplied.)

At page 153 of the opinion, the Court said:

> "Personal service here is not denied."

The validity of the service in the *Parker* case was not questioned. In the case at bar, it was challenged from the beginning.

Petitioner Was Not Liable for the Damages Assessed As Penalties in the Two Death Cases.

Under the facts petitioner and Clark, its employee, were governmental agents, acting under military orders in trans-

porting for military purposes trucks belonging to the Government to be used in the prosecution of the war. They were acting under governmental instructions and restrictions and a government bill of lading issued by military authorities of the government in Atlanta as consignors with directions to deliver the trucks to the Quartermaster in New Orleans as consignee. There was no other cargo and the sole representative of the government at the time the accident occurred was Clark, the driver of the truck involved in the accident and also in charge of the entire convoy of five trucks. Stripped of all camouflage, with which respondents attempt to surround the affair, all petitioner did was to furnish the driver for the transportation and delivery of the trucks, for which it was to be paid after delivery and after the surrender of the government bill of lading and after the charges for transportation had been audited. Although a common carrier, petitioner became the agent of the government and was subject to the orders and directions of the government and its military authorities. If Clark and petitioner committed any wrong, they were amenable to the federal government and that government alone.

Under the facts unquestionably there was a clash between State Sovereignty and Federal Sovereignty, resulting in delaying the transportation of the trucks to their destination, the arrest and imprisonment of Clark, the driver, imposition of a fine against him for a petty misdemeanor followed by twenty days imprsonment for nonpayment and continued imprisonment until the Grand Jury failed to indict him upon the charge of manslaughter. This was followed by the suits for penalties and the imposition of civil fines aggregating $16,500.00 under the Alabama Homicide Statute. In their earnest plea that

State Sovereignty should prevail, counsel for respondents ask:

> "What has petitioner done that has made it immune from the laws of Alabama and placed it upon a pedestal armed with a license to wrongfully take the lives of two of our citizens and go unwhipped of justice?"

The answer is that as above stated, if wrongs were committed, petitioner under the facts is answerable to the federal government under whose authority it and Clark were acting, whose sovereign power has been challenged by the State and whose efforts to wage war and save the country from destruction have been impeded and retarded.

It was and is for the Federal Government to say what wrongs and crimes if any have been committed and what punishment should be meted out.

In their brief counsel for respondents assert:

> "The law is that a government official is liable for its wrongs, war or no war, unless expressly exempted from such liability by some law."

As a general proposition, this is not denied. They cite several authorities to support their contention. The question of general liability is not an issue in this case. The insistence is that, because of conflict between Federal and State Sovereignty, petitioner and Clark were amenable only to the federal government for their acts and any wrongs committed by them, because they were agents of the government. The Nation was at war and they were engaged in carrying out military orders at the time of the accident. The authorities cited by Counsel are not in point. They relate to acts committed in times of peace.

Counsel also attempt to argue the alleged acts of negligence on the part of Clark. That is not involved in the

issues presented to this Court for decision. The complaints filed by respondent allege that he was acting within the line and scope of his authority. This being true, whatever acts of negligence were committed and the laws governing the same are federal questions to be determined by federal law. Where the state law is in conflict, it must yield.

We may say here, however, that should the petition for certiorari be granted, and it is permissible to open up the entire case, the facts in the record will show that the accident could not have happened as contended for by respondents and that the physical facts corroborated by other evidence when fairly considered show that Clark was not guilty of negligence.

It is insisted that petitioner was not a governmental agent and subject to governmental and military orders because it was not actually taken over by the government. This was not necessary. Under the statutes cited in the petition for certiorari and supporting brief, the government was clothed with ample power to requisition the services of petitioner without a formal order taking it over. All it had to do was to commandeer or requisition the services of petitioner. This was done. This was all that was necessary.

Roxford Knitting Co. v. *Moore & Tierney,* 265 F. 177.

Neither was it necessary for the government to actually take petitioner over in order to protect it from penalties imposed by state law.

Astoria Light H. & P. Co., 30 A. L. R. 1458.

At the time of the accident more than three thousand American soldiers had been killed at Pearl Harbor and others were left wounded. Many lives had been lost in the gallant attempt to hold Bataan and Corregidor and other

soldiers and sailors had gone down in the Coral Sea, battling to save their country from destruction. In the wake of these battles were left widows and orphans and many wounded and maimed for life. The whole world was aflame from fires, kindled by despotic and cruel nations accompanied with threats of a Japanese Commander that they would write the terms of peace in the Capitol at Washington.

It was under these conditions that appellees insist that Clark, the representative and agent of the sovereign power of the Government, guarding the safety of one hundred and thirty million people was without right to pass a wagon on the nation's highway going at a snail's pace in order that he might accomplish the mission entrusted to him. It was under these conditions it is insisted that State sovereignty was supreme and that National sovereignty was not involved.

We respectfully insist that this contention is utterly lacking in merit.

The evidence does not show how long the trucks were delayed by the arrest and imprisonment of Clark, but this is not material. Even the slightest delay was a retardation of the war efforts in the phase of activity in which Dealer's Transport Company and Clark were engaged as agents of the government when the accident occurred. The all important matter requiring prompt attention was the expeditious delivery of the trucks in New Orleans for the prosecution of the war. Under these circumstances Clark should have been permitted to continue his trip to New Orleans in order that the trucks might be promptly delivered instead of arresting and imprisoning him and leaving the trucks stranded by the wayside.

As already stated, whether Clark was or was not guilty of negligence in so far as the State of Alabama and the parties to these suits are concerned is not a question to be

determined under the laws of Alabama. Such questions can only be settled under the laws of the United States.

The accident was unfortunate and of such a nature as to arouse sympathy for the unfortunate victims and their relatives. At the same time this government was and still is at war.

Railroads and other common carriers, including transportation companies are the chief facilities used by the government for transporting troops, war supplies, aeroplanes, motor vehicles and other implements of war necessary for carrying it on.

Without requisitioning their services, the government would have been powerless to transport troops, food, clothing, munitions and weapons of war, as well as the other implements and machinery indispensable in carrying the war to a successful completion.

In his syndicated newspaper article of September 12, 1943, Drew Pearson states that between Pearl Harbor and May 31, 1943, the Army Transportation Corporation moved more than twenty million U. S. Troops by rail for a total distance of seventeen billion miles.

While he does not give the information, the transportation of motor vehicles, food, clothing, war supplies, arms and munitions would present like staggering figures.

It is needless to say that in rendering these services and carrying out the orders of the government, mistakes are made, daily accidents occur and civilians are killed or injured. Each of the states probably has homicide statutes similar to those of Alabama. If suits in State Courts of the nature instituted in the instant cases are permitted and penalties inflicted, there is no reason why a railroad company conveying car loads of motor vehicles of the same nature as those involved in these suits can not be held liable for damages and penalties where engineers unfortunately kill civilians in the operation of the trains. There is no

reason why these engineers in such cases may not be dragged from their trains upon the happenings of the accidents and placed in jail upon criminal charges as in the instant cases and carriers sued for punitive damages under homicide statutes in the different states. If such be the law, there is no reason why a railroad company as a common carrier transporting a train load of soldiers to a battle front or to a port of embarkation, charged with the duty of using all possible speed, could not in case of accident be held up, its train left idle on the track, the engineer arrested and imprisoned on criminal charges preferred by the State, and suits for heavy damages be brought under the homicide statute as additional punishment to be inflicted on the agent of the Government. The same would also be true as to transport companies, serving the government in like manner.

In such cases no more deadly torpedoing of the Government's efforts to carry on the war can be imagined.

Had in the instant case, under the plaintiff's theory of State Sovereignty, the trucks in the convoy been filled with soldiers to be carried to a port of embarkation with limited time to reach it, the State would have had the same right as here exercised, in case of accident, to arrest and imprison Clark and thus stop transportation of the troops until it was too late for them to reach the point of embarkation. At the same time the State could also exercise its prerogative to impose additional fines and penalties by the institution of suits through administrators to enforce the Homicide Act and thus again punish the agents of the government and impede its prosecution of the war.

If the principles of law invoked by appellees are permitted to stand, a dangerous precedent will be set and suits of the nature instituted in these cases will be everywhere invited and the state will become a paradise for litigation of this kind.

The killing of two human beings and the seriously injuring of another is greatly to be regretted. The accident appeals to human sympathy and no doubt the sympathies of the jury were deeply aroused resulting in the verdicts complained of. Clark and the Dealer's Transport Company were agents of the government engaged in carrying out mandatory orders in aid of the prosecution of the war. The delivery of the trucks as speedily as possible was imperative. The authority of the government he was serving was supreme. At the time of the accident the greatest war the world has ever known was being waged. Issues involving the future of all civilized nations were at stake. The destinies not only of this nation of one hundred and thirty million people, but the fate of all nations and the preservation of a Christian civilization, two thousand years in the making, were all hanging in the balance and the end is not yet.

Under these conditions the sovereignty of this great nation was supreme and its power to call upon all organizations and commandeer their services was and is unquestioned. In the exercise of this supreme authority, state sovereignty is compelled to yield and all of its laws in conflict with national sovereignty must of necessity be suspended as long as the great struggle continues.

Respectfully submitted.

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